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In the Supreme Court of the United States

No. 901

OCTOBER TERM, 1969.

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

ASHWOOD CONSTRUCTION COMPANY, *et al.,*
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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In the Supreme Court of the United States

No. _____.

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vs.

ASHWOOD CONSTRUCTION COMPANY, *et al.,*

Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit made and entered on the 4th day of September, 1969.

OPINIONS BELOW.

The case was tried in the United States District Court for the Northern District of Ohio, Eastern Division. The opinion of the Honorable Girard E. Kalbfleisch was filed January 10, 1968 and is reprinted as Appendix 1 and annexed hereto.

An appeal was perfected to the United States Circuit Court for the Sixth Circuit. The opinion of the United States Court of Appeals is reprinted as Appendix 2 and annexed hereto.

JURISDICTION.

The judgment of the Circuit Court of Appeals for the Sixth Circuit was made and entered on the 4th day of September, 1969. Jurisdiction of this Court is invoked under favor of 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Whether the motion of United Bonding Insurance Company, petitioner herein, to dismiss Ashwood Construction Company as a party to the proceedings should have been granted?

2. Whether, at the time of performance, namely May 15, 1965, was the respondent Ashwood Construction Company financially unable to perform its contract, thus discharging the petitioner as surety?

3. Whether there was a substantial or cardinal alteration of the contract between principal and the obligee thus discharging the obligation for the surety?

4. Whether the performance bond in question was a direct action bond extending to subcontractors and materialmen, not parties to the same, or whether they are fully protected under their mechanics' lien rights.

5. Whether the negotiations between Central Excavating Company, one of the respondents, and United Bonding Insurance Company, the petitioner, resulted in a contract and if so, to what extent did Central perform that contract?

6. Whether one, a surety, or who through others, substantially performs a contract is entitled to payment or credit quantum meruit, or being compelled to pay the debt of a principal is entitled to subrogation?

STATUTE INVOLVED.

The Statute involved is Section 2307.05 Ohio Revised Code which provides:

> "An action must be prosecuted in the name of the real party in interest * * *."

STATEMENT OF THE CASE.

This action was instituted by the petitioner, United Bonding Insurance Company as surety, against the respondent, Ashwood Construction Company as obligee on a performance bond wherein the Timzan Construction Company was principal. The action prayed for a declaratory judgment and joined as parties defendant the other respondents, Pete Salemi, d/b/a Central Excavating Company, Arrow Builders & Supply Company, Air Compressor & Rental Company, d/b/a A.C.R. Equipment Company, J. J. Turner Company and Arturo Construction Company, all of whom perfected mechanic's liens against the property.

The cause proceeded to trial before the Honorable Girard E. Kalbfleisch, Judge of the District Court sitting without a jury. On the 10th day of January, 1968, the Court entered judgment in favor of Ashwood Construction Company for One Hundred Thousand Three Hundred Eighty Two Dollars and Forty Two Cents ($100,382.42); in favor of Pete Salemi, d/b/a Central Excavating Company for Seventy Eight Thousand Five Hundred Seventy Three Dollars and Sixty Six Cents ($78,573.66); in favor of Arrow Builders Supply Company for Thirty Seven Thousand Five Hundred Fifty Two Dollars and Fifty Five Cents ($37,552.55); in favor of Air Compressor Rental Company for Twelve Thousand Dollars ($12,000.00); in favor of Arturo Construction Company for Five Thousand Five Hundred Seventy Seven Dollars

($5,577.00) and in favor of J. J. Turner Company for Nine Hundred Thirty Five Dollars and Sixty Three Cents ($935.63) all with interest. Motion for amendment of judgment, motion for leave to amend pleadings and motion for new trial were overruled February 7, 1968. The District Court did not rule upon the motion of United Bonding Insurance Company, petitioner herein, to dismiss Ashwood Construction Company as a party to the proceedings.

An appeal was duly taken to the United States Court of Appeals for the Sixth Circuit which on September 4, 1969, affirmed the District Court. The order affirming is set out in Appendix 3.

REASONS FOR GRANTING THE WRIT.

1. The finding of the District Court as affirmed in favor of Ashwood Construction Company is contrary to Section 2307.05 Ohio Revised Code and Rule 17 (a) of the Federal Rules of Civil Procedure that an action must be prosecuted in the name of the real party in interest.

2. The finding, as affirmed, in favor of Ashwood Construction Company, at the time in question, namely May 15, 1965, the latter then being wholly unable to meet its contractual obligations, is contrary to the Common law of the State of Ohio where the contract of suretyship was executed and where the action was tried. *Erie Railroad vs. Thompkins,* 304 U.S. 64.

3. The finding as affirmed in favor of Ashwood Construction Company permitting the Obligee, Ashwood Construction Company, to substantially alter the contract is in conflict with the announced decisions of this Court. *Prairie State Bank vs. United States,* 164 U.S. 227 and of the law of Ohio. *Brewing Company vs. Schultz,* 68 Ohio State 407.

4. The finding, as affirmed in favor of Central Excavating, Arrow Builders & Supply Company, Air Compressor Rental Company, J. J. Turner, Inc. and Arturo Construction Company is contrary to the laws of Ohio. *Cleveland Metal Roofing & Ceiling Co. vs. Gaspard,* 89 Ohio State 185; *Royal Indemnity Co. vs. The Northern Ohio Granite & Stone Co.,* 100 Ohio State 373; *Cleveland Window Glass & Door Co. vs. The National Surety Co.,* 118 Ohio State 414, *Royal Indemnity Co. vs. Day & Maddock,* 114 Ohio State 58. *Carruth vs. Standard Accident Insurance Co.,* 329 Fed. 2d 690; *Indemnity Company of North America vs. Portsmouth Ice, Coal & Building Materials,* 122 Ohio State 439.

5. The finding as affirmed in favor of Central Excavating Company is unsupported in that the negotiations never resulted in a contract, nor, did Central Excavating perform, nor was performance alleged 2A *Moore's Federal Practice* 1763.

6. The findings as affirmed gave no allowance for substantial performance of 95% of the work done nor of the right of subrogation when the surety was required to pay.

I. THE MOTION OF UNITED BONDING INSURANCE COMPANY, PETITIONER HERE, TO DISMISS ASHWOOD CONSTRUCTION COMPANY AS A PARTY IN INTEREST TO THE PROCEEDINGS SHOULD HAVE BEEN GRANTED.

On or about December 11, 1964, the Timzan Construction Company entered into a contract of construction in three phases with the Ashwood Construction Company. United Bonding Insurance Company, as surety, executed a performance bond in respect thereto in the sum of One Hundred Sixty One Thousand Dollars ($161,000.00). On

November 2, 1964, Ashwood Construction Company, being one of twelve subsidiaries, along with its parent Dover Construction Company, signed a joint and several promissory note to Commercial Discount Corporation of Chicago, Illinois in the sum of One Million Five Hundred Thousand Dollars ($1,500,000.00). On May 7, 1965, this note was increased to Two Million Dollars ($2,000,000.00). The notes were secured by a general assignment. (Joint Exhibit 1, A-Z) page V of that document contained the following:

> "We hereby grant you a security interest in *and assign and pledge to you* all present and future accounts, chattel papers, *contract rights.* * * *" (Emphasis supplied.)

This assignment was buttressed by the Resolution of the Ashwood Construction Company dated November 2, 1964, and known in evidence as Plaintiff's Exhibit 25 which included "all things in action."

The Prudential Insurance Company entered into a loan commitment, with Ashwood Construction Company, subject to three conditions, none of which were fulfilled, for $500,000.00. The Commercial Discount Corporation served notice of the assignment to it upon Prudential (Plaintiff's Exhibit 22). Prudential construed this assignment to mean that all funds encompassed in the commitment were presumably to be delivered to Commercial Discount Corporation (R. 409-410).

By this assignment Ashwood was not the real party in interest to these proceedings. Actions must be so prosecuted. Federal Rules of Civil Procedure 17 (a). The Resolution of Ashwood Construction Company had authorized the assignment of "all things in action." Prudential Insurance Company upon whom the assignment was served and Commercial Discount Corporation, the assignee con-

strued the document as a general assignment, which in fact it was.

An action must be prosecuted in the name of the party, who, by the substantive law, has the right to enforce it. 3 *Moore's Federal Practice* 1330. This requires that the assignee prosecute the action. 3 *Moore's Federal Practice* 1334-1335 and 1339. Assignment transfers and vests in another all property rights. 5 *Ohio Jurisprudence* 2d 151. This includes intangible property rights commonly known as choses in action. 5 *Ohio Jurisprudence* 2d 152. An assignment transfers the whole of any property right and any estate or right therein. *Bouvier* 91, 6 *Corpus Juris Secundum* 1045. The proceeds of an executory contract vest immediately in the assignee. 5 *Ohio Jurisprudence* 2d 187.

Ashwood Construction Company having assigned its rights to Commercial Discount Corporation, the motion to dismiss Ashwood Construction Company should have been granted.

II. AS OF MAY 15, 1965, THE DATE OF PERFORMANCE, ASHWOOD CONSTRUCTION COMPANY WAS UNABLE TO MEET ITS FINANCIAL OBLIGATIONS. SUBSEQUENT THERETO ON AUGUST 16, 1966, IT, TOGETHER WITH DOVER CONSTRUCTION AND ALL ITS SUBSIDIARIES WAS PRECIPITATED INTO BANKRUPTCY.

On the crucial date, May 15, 1965, the Township Trustees had denied Ashwood Construction Company any further building permits on the premises (R. 509). Real estate taxes on the premises were delinquent and unpaid (R. 424-427). Ashwood Construction Company was jointly obligated on the Two Million Dollar ($2,000,000.00) note as above set forth. Its only asset was bare, naked title to the land, it having acquired title from a sister subsidiary of Dover Construction Company namely, Bolingbrook

Construction Company, by a book entry to "land" of Two Hundred Fifty Thousand Dollars ($250,000.00) and an offsetting entry to "accounts payable" Bolingbrook of the same amount. As of that date the net worth of Ashwood Construction Company was Five Thousand Thirteen Dollars and Ninety Three Cents ($5,013.93), Four Thousand Five Hundred Dollars ($4,500.00) of which was capital stock not paid in (R. 254). Additional obligations, not shown on its books and not revealed until the filing of the schedules in bankruptcy approached One Million Three Hundred Thousand Dollars ($1,300,000.00) (plaintiff's exhibits 1-19; plaintiff's exhibit 41, Bankruptcy schedules).

The commitment from Prudential Insurance Company contained three conditions, none of which were fulfilled, namely, that (1) a certificate of completion would be tendered, (2) all assessments due or to become due would be paid, (3) that a completion and subdivision bond would be provided. In any event the commitment was blocked by notice of the assignment to Commercial Discount Corporation.

The Treasurer of Ashwood Construction Company testified that it neither kept nor prepared any financial records such as profit and loss statements or a balance sheet (R. 37) or that he had any idea of its assets (R. 60), or that as of April 15, 1965, Ashwood had sufficient funds to pay phase one of the contract (R. 200) nor of any funds on deposit to the credit of Ashwood.

The surety need not perform where it is apparent and obvious that it will not be paid. Justice does not require that it settle its claim in the Court of bankruptcy. A contractor need not trust the credit of another whom he finds insolvent, even though he has agreed to do so. 6 *Williston on Contracts*, 378. To require a contractor to make expensive preparations or part performance which will be

futile if the contract is not carried out is an unreasonable hardship.

This doctrine is grounded upon the principle of anticipatory breach. One who knows, or has good reason to believe that a contract promise can not or will not be performed is excused from performance. It is significant to note that the petitioner demurred to the cross-complaint of Ashwood for the reason that the cross-petition failed to allege its ability to perform or pay.

Anticipatory breach is ground for the recision of a contract, 11 *Ohio Jurisprudence* 2d 555. If at the time fixed for performance, the promisor is insolvent, the counter promise is discharged. 11 *Ohio Jurisprudence* 555. If at the time fixed for performance, the promisor is insolvent, the counter promise is discharged. 11 *Ohio Jurisprudence* 2d 219. If Ashwood could not pay, United need not perform. Every consideration of justice requires that inability to perform should immediately excuse further performance. *Williston,* Revised Edition, Section 1315, page 3713. The doctrine of anticipatory breach is available even where performance is only apparently impossible. *Restatement of Contracts,* Section 318. By definition of the *Restatement of Contracts* Section 287, one is insolvent when he is unable to pay his debts as they mature. The rationale is further set forth in *Williston on Contracts* 3rd Edition, page 344, Section 699 to the effect that no one is compelled to do a useless act, and that a "manifestation of inability to perform has the same effect" (p. 350). The Ohio law is to the same effect, *Diem vs. Koblitz,* 49 Ohio State 41.

Ashwood being unable to perform, the contract of suretyship was discharged.

III. BY INCREASING THE BOND REQUIREMENT FROM ONE HUNDRED SIXTY ONE THOUSAND DOLLARS ($161,000.00) TO TWO HUNDRED TWENTY ONE THOUSAND DOLLARS ($221,000.00), AN INCREASE OF THIRTY SEVEN PERCENT (37%) THERE WAS A MATERIAL AND CARDINAL ALTERATION OF THE UNDERLYING OBLIGATION WHICH DISCHARGED THE SURETY.

The performance bond in question, CG-1097, was in the principal sum of One Hundred Sixty One Thousand Dollars ($161,000.00). It was stated by Mr. Lefkowitz, President of the obligee that this bond was "not accepted." If this be so there was no bond in the first instance. Sometime in March of 1965 Ashwood increased the requirements of Phase One of the project by Sixty Thousand Dollars ($60,000.00). A "rider" for that amount was prepared but never executed by the principal Timzan, Inc. Ashwood obtained a copy of this "rider" unsigned by the principal. In the pre-trial proceedings Ashwood filed a motion for summary judgment at which time the District Court ruled as follows:

> "A *recomputation* of the work to be done under one of the Timzan contracts indicates that the contract price is $221,000.00 whereas the *original* price was $161,000." (Emphasis supplied.)

The Court further observed that the rider contained the following:

> "*Now, Therefore,* in *consideration of an additional premium to be paid the Surety,* it is agreed that the penal sum in said bond shall be hereby increased by the sum of $60,000." (Emphasis supplied.)
>
> "In witness the *Principal* and Surety have hereunto set their hands." (Emphasis supplied.)

The opinion of the District Court continued:

> "Ashwood has not introduced evidence that the additional premium was paid. Moreover, although the rider bears the signature of an officer of the plaintiff, the 'Surety' there *is no signature of an officer of Timzan, the 'Principal.'*" (Emphasis supplied.)

The motion for summary judgment was thereupon denied. It is significant that with this caveat, Ashwood failed to introduce any evidence upon the trial that the *additional premium had been paid.*

It has been held that alteration, however slight will discharge the surety. The surety itself must be the sole judge whether or not it will remain liable. *Prairie State Bank vs. United States,* 164 U.S. 227. The increase of the original contract by Sixty Thousand Dollars ($60,000.00) sought to increase the obligation of suretyship by that amount, a thirty-seven percent (37%) increase. This was so material as to discharge the surety. Regardless of how trivial the alteration may be, or even if it operate to the advantage of the surety, the latter is discharged. *Reese vs. United States,* 9 Wall. 13.

Williston puts the requirement at "anything more than a mere immaterial" alteration, 4 *Williston,* Revised Ed., 3547.

Under the law of Ohio the burden rests with the obligee to prove that there was no material alteration. *Brewing Company vs. Schultz,* 68 Ohio State 407 at page 416.

> "The surety has a right to stand upon the very terms of his contract, the exact letter of his bond, and if he does not consent to any variance of it and a variation is made, such variation operates to annul his contract and to discharge him from liability."

The case continues by putting the burden of proof upon the *creditor to show that there was no material alteration of* the underlying agreement (at page 420):

> "* * * the burden is upon it to plead and prove such consent, and not upon the surety to show and prove that such failure to perform was without its consent."

To the same effect are *Stearns: Law of Suretyship,* 5th Edition, Section 6.1; *Restatement of Suretyship,* Section 128 Comment D page 342; 72 *Corpus Juris Secundum* 618; *Simpson on Suretyship* 330 citing the increase in interest rate from 4% to 5% and 50 *American Jurisprudence* 932.

IV. THE BOND IN QUESTION NOT BEING A DIRECT ACTION BOND, THE MATERIALMEN, CENTRAL, ARROW BUILDERS & SUPPLY, AIR COMPRESSOR RENTAL COMPANY, J. J. TURNER AND ARTURO CONSTRUCTION HAD NO RIGHT OF RECOVERY UPON IT. ALL MATERIALMEN WERE FULLY PROTECTED BY THE LIENS FILED BY THEM.

The finding and judgment as affirmed failed to distinguish between public liability bonds and bonds for purely private construction. Public construction bonds are covered in Ohio by Section 153 of the Ohio Revised Code where a right of direct action is given laborers and materialmen not parties to the contract. As to construction bonds of a purely private nature, as in the instant case, no direct right of action exists. The materialmen were not obligees under the bond which ran to Ashwood Construction Company.

Why is this so? For reasons of pure logic. The premium was not paid by third parties such as the materialmen. They suffered no legal detriment. Their rights are fully protected by the mechanic's lien laws of which

they took advantage. Concerning the right of third persons, not parties to the bond to recover in private construction, the law of Ohio is encompassed by the following decisions: *Cleveland Metal Roofing & Ceiling Company vs. Gaspard,* 89 Ohio State 185; *Royal Indemnity Co. vs. Northern Ohio Granite and Stone Co.,* 100 Ohio State 375 and *Cleveland Window Glass & Door vs. The National Surety Company,* 118 Ohio State 414.

In *Gaspard* the Supreme Court of Ohio held that a bond in private construction was for the protection of the owners of the building and that an action on the bond can not be maintained for labor and materials. It was held that laborers and materialmen could not sue and recover on the bond. The covenant in the bond in *Gaspard* was similar if not identical to the covenant in the instant bond.

Royal Indemnity Co. vs. Northern Ohio Granite & Stone Company, 100 Ohio State 375 "overruled" *Gaspard* as to public construction contracts. *Royal Indemnity* was a contract for public construction. The Court held at page 377:

> "While under our statute our mechanic's lien law may not have provided for liens of this particular structure, because of its *public nature,* the city, in this case, knowing that fact, may have had in contemplation the protection of mechanic's and materialmen, who could *not obtain a valid lien upon this structure.*" (Emphasis supplied.)

This is the distinction. In public construction claimants are denied the right of a mechanic's lien whereas in private construction they are not. Accordingly they are given a right of direct action on the *bond* in *public construction only.* This right is now preserved in Section 153 et sequel of the Ohio Revised Code.

All doubt as to private construction was resolved in *Cleveland Window Glass & Door vs. The National Surety Company*, 118 Ohio State 414. The issue therein presented was whether or not the rule announced in *Royal Indemnity* as to public construction should be extended to *purely private construction*. The Court held that the rule of *Royal Indemnity* should not be so extended.

The Ohio Supreme Court in *Cleveland Window Glass* clearly distinguished between the two situations at page 420 of the opinion:

> "Another very clear distinction between the *Royal Indemnity* case and the instant case is that the former involved a *public contract*, in which neither the *materialmen nor laborers could be afforded the protection of a lien.*" (Emphasis supplied.)

Cleveland Window Glass disposes of the claimed right of third parties such as materialmen to rely upon the bond at page 417 of the opinion:

> "The plaintiff asserts that before it contracted to furnish material and labor to the Wade Chateau Company it had knowledge of the execution of said bond, and *relied thereon*. It asserts that under the terms and conditions of such bond the National Surety Company became bound to pay plaintiff's claim upon the failure of the Wade Chateau Company so to do." (Emphasis supplied.)

The surety demurred to the petition and that demurrer was sustained. The Supreme Court of Ohio affirmed the opinion of the Court of Appeals, Eighth Judicial District of Ohio, reported in 21 Ohio Appeals 65. The opinion in the Court of Appeals sets forth the rationale. From page 71 of the opinion:

> "What was the intention of the parties, deducible from the provisions of the bond, especially the obliga-

tions of the bond? No matter what the terms of the deed of trust are, the ground for recovery, the existence of legal liability, must be imbedded in the terms of the bond. There is such a vast difference between the claim that it runs to both the bondholders and the lienholders, and the claim that it runs to the bondholders alone, that it must be assumed that this striking fact, involving not only the question of *financial responsibility,* but of *premium payments* as well, was just as patent, important, and obvious *prior to the execution of the instrument,* and during its drafting, as at the present time, and, if so, is it *unreasonable to assume that if the former was their* intent the parties to the bond would not have drawn upon a wealth of language to incorporate in the bond those words, phrases and clauses which *would specifically include lienholders* as well as bondholders, or which, by their employment, would specifically provide that the contract or obligation was for the benefit of third parties not actual parties to the contract? * * * If the bond was to run to lienholders as well as bondholders, it is only *simple logic to say that language of such import would have been employed.* But there is no word of this nature expressly stated in the bond, and this *absence can only mean that it was not the intention of the parties to have the bond run to both the bondholders and the lienholders.* The bond distinctly runs to the bondholders, and to insert lienholders as well, without express or implied authority, is the *executing of a new and additional obligation* on the part of the *surety company, not warranted by any construction of* which the language *is capable.* If the contrary were the intention, the conclusion is *inevitable that the insurance company* would have *inserted a clause including lienholders,* and would thus *have secured an additional premium, and the principal of the bond would have insisted upon the employment of such a clause as a matter of self-preservation.* This situation applies to the Guardian

> Savings & Trust Company, as well as to the Wade Chateau Company. Language is not *ambiguous* that *needs no explanation.* The terms of the bond run to the bondholders alone, because the bond ends with that mission, and it employs no language whatever, directly or indirectly, that includes anything or anybody but the bondholders; when the *obligation ends with bondholders, then the* clause is left without *doubt, shorn of uncertainty, and* there *is, therefore, no ambiguity, and no need of resort to the rules of construction.* The doubt must arise from the language, *not from the invention of the mind.* The uncertainty must *sound from within the language, not from without.*" (Emphasis supplied.)

The Supreme Court of Ohio disposes of the contention urged by *Royal Indemnity* at page 419 of the opinion:

> "Upon the authority of the decision of this court in Royal Indemnity Co. v. Northern Ohio Granite & Stone Co., 100 Ohio St., 373, 126 N.E., 405, 12 A.L.R., 378, it is sought *to hold this bond liable for material and labor which went into the construction of said building not satisfied from the proceeds of the sale of the leasehold,* which was sold subject to the bonded indebtedness. *To so hold would be to extend the principle announced in the Royal Indemnity case, supra, which we are not disposed to do.*" (Emphasis supplied.)

In commenting upon the reason for the rule in *Royal Indemnity,* the Supreme Court of Ohio quoted in *Cleveland Window Glass* at page 420 from *Royal Indemnity*:

> "While under our statute our mechanic's lien law may not have provided for liens on this particular structure, because of its public nature, the city in this case (Royal Indemnity) knowing that fact, may have had in contemplation the protection of mechanics and materialmen who could not obtain a valid lien upon this structure." (Parenthesis supplied.)

The Court concludes on pages 420 and 421 that the remedy of the materialmen was in the filing of liens, which they did as in the instant case, although in *Cleveland Window Glass,* the interest of the principal was insufficient to pay their claim in full.

The finding as to Air Compressor Rental is clearly contrary to the decision of the Supreme Court of Ohio. The claim of Air Compressor Rental is to the effect that it rented certain equipment to Timzan. Whereas, the evidence more clearly showed a sale of the same. Air Compressor Rental was not entitled to recover on the bond for the reason that it could not file a valid lien. In *Royal Indemnity vs. Day and Maddock,* 114 Ohio State 58, the Supreme Court of Ohio held adversely to Air Compressor Rental. The force of the opinion is even greater when it is considered that the construction in *Day and Maddock* was public and not private. The syllabus, which in Ohio is the law of the case, is as follows:

> "1) The surety on a bond executed by a contractor for the construction of a public building, in conformity to the requirements of Sections 2365-1, 2365-2 and 2365-4, General Code, *does not thereby obligate himself to pay the rental, contracted to be paid by the principal in the bond for the use of a concrete mixer, hoisting engine, or other machinery used as appliances, or part of the equipment to facilitate the performance by the contractor of his contract, nor does he obligate himself for any other expense incident to such rental use.*" (Emphasis supplied.)

The theory of recovery in a proper case, is set forth on page 66 in a quotation from *Massachusetts Bonding Co. v. Chouteau Trust,* 264 Fed. 793:

> "The contractor's bond in question is provided, in the scheme of public improvement of the city, to take the place of the statutory liens of laborers and materialmen under the lien laws of the state."

A recent Federal case decided under the Ohio law denies Air Compressor the right to recover upon equipment rentals. *Carruth vs. Standard Accident Insurance Co.*, 329 Fed. 2d 690; 5th C.C.A. (1964) was a suit by an equipment rental company under a bond, the pertinent provisions of which are as follows:

> "* * * the parties hereto agree that this undertaking shall be for the use and benefit of all *creditors* having just claims incurred by the principal for labor performed upon and for *materials or services* furnished for the work specified in said sub-contract, whether lienable or otherwise and this bond may be sued upon by them as if executed to them in proper person, as well as for the obligee. If the principal shall promptly *make payment to all persons supplying labor and material in the prosecution of the work* provided for in said subcontract * * * then this obligation to be void." (Emphasis supplied.)

One could hardly conceive language more favorable to the supplier of equipment. Nevertheless the Court held to the Ohio rule as announced in *Royal Indemnity Co. vs. Day and Maddock*, 114 Ohio State 58, cited at the bottom of page 691 and denied recovery to the lessor of equipment. The Court also cited and relied upon *Cincinnati Quarries Co. vs. Hess*, 28 Ohio Appeals 340.

36 *Ohio Jurisprudence* 2d 487 Mechanic's Liens, is as follows:

> Sec. 51 Tools and Appliances.
>
> "While mechanic's liens may be had for materials and machinery furnished for the purposes enumerated in the statute, the rule is otherwise as to tools and appliances *used only* temporarily during the process of construction." (Emphasis supplied.)

The true import of the language "machinery" used in the statute 1311 O.R.C., et sequel, is that machinery which is incorporated into the land itself as a fixture,

which, of course, was not the case here. Those used "temporarily in the process of construction" do not create lien rights in the owner-lessor thereof.

The Supreme Court of Ohio seems to have decided the very issue here in contest. That Court ruled per curiam in *Indemnity Co. of North America vs. The Portsmouth Ice, Coal & Building Material Co.*, 122 Ohio State 439 as follows at page 441:

> "Material may be carried to a place on a structure by a hodcarrier, and when carried to the proper place upon the building, it may be placed in position by the use of a trowel by the mason building the wall. The labor of the hodcarrier and the labor of the mason are expended in the completion of the structure, and inseparably incorporated therein; but neither the hod nor the trowel forms any part of the structure. An engine with its attachment of block and tackle may hoist most of the material of a structure into place and hold it there until it is made fast by other appliances. In the doing of this class of work on steel structures, most of the steel is hoisted into place by the engine with its block and tackle, and is then bolted to hold it in place until the final riveting process is gone through with. After that the bolts are removed to be used on other metal parts of the building, and may be used later in many steel structure buildings. The engine *with its hoisting tackle*, and the bolts used temporarily as stated, form no part of the building." (Emphasis supplied.)

None of the suppliers of materials had the right to recover on the bond under the decisional law of Ohio. This is particularly true of Air Compressor Rental which only rented and/or sold equipment for use on the premises.

Arturo Construction Company never entered an appearance and never filed a responsive pleading. It is not entitled to recover.

V. THE NEGOTIATIONS BETWEEN UNITED AND CENTRAL EXCAVATING NEVER RIPENED INTO A CONTRACT. CENTRAL PROCEEDED AS A VOLUNTEER. IN ANY EVENT IT FAILED TO PERFORM THE NECESSARY CONDITIONS PRECEDENT ENTITLING IT TO PAYMENT.

Central Excavating was originally a sub-contractor of Timzan, the general contractor. In its cross-petition it asserts that it did "certain work" in furtherance of the project. Numerous rough drafts of a proposed contract passed between the parties (Central's Exhibits D and E) none of which were ever executed. Page four (4) of the Cross-Petition filed by Central provided:

> "* * * the said United Bonding Insurance Company entered into an oral contract with this answering defendant employing your answering defendant to complete the installation of storm and sanitary sewers, the installation of water mains, curbs and roads in said Phase One of the *original contract between Timzan, Inc. and Ashwood Construction Company.*" (Emphasis supplied.)

The underlying contract between Timzan and Ashwood contained the following provisions:

> "* * * any additions or revisions as required by the County of Cuyahoga (the governing authority of Olmsted Falls) * * * and the latest detailed standard specifications for constructing water mains and appurtenances of the City of Cleveland." (Parenthesis ours.)

Central showed that it did "certain work." It did not show that it was according to the specifications set forth in the underlying contract as above set forth, or that it was according to the specifications of any governmental body. Of what utility is its "work" if it fails to pass in-

spection. Central's Cross-Petition did not allege performance of its obligations under the "contract." Under Rule 12 h (1) of the Federal Rules of Civil Procedure the defense of failure to state a claim is not waived. In 2 *Moore's Federal Practice* 1763 it is stated that the pleader *must* state that he has performed his obligations under the contract.

On May 19, 1965, Central claimed Twenty One Thousand Dollars ($21,000.00) due and unless that amount were paid, it would do no further work. No payment was forthcoming and what Central did thereafter, it did only as a volunteer.

On March 22, 1965, Central addressed a letter to United (joint exhibit 40) stating that Central was ready, willing and able to furnish the necessary labor, material and equipment to *complete Phase One of the Timzan, Inc. contract with Ashwood.* This clearly incorporated the Timzan agreement with Ashwood into the offer. The proposal continued by stating that Central would submit monthly estimates to the engineer for approval before payment. This was never done. The proposal continued by stating that if certain advances were made, Central in turn would reimburse suppliers of materials through March 19, 1965. United issued two checks, one for Fifteen Thousand Dollars ($15,000.00) and one for Twelve Thousand Dollars ($12,000.00) (Central's Exhibits U and V). Central accepted and cashed these checks but *never* fulfilled the conditions of payment to suppliers. If there was a contract between United and Central that agreement was breached by non payment over to the suppliers.

The testimony reveals that counsel for Central had full authority to deal in this matter. The letter of May 19, 1965 (United's Exhibit 40) states the claim to be

Twenty One Thousand Seventy Two Dollars and Fifty Two Cents ($21,072.52) and that unless this amount be paid, no further work would be done. Central can recover no more than this amount, if indeed, it can recover at all.

VI. THE CONTRACT IN QUESTION WAS NINETY FIVE PER CENT (95%) COMPLETE. THIS AMOUNTS TO SUBSTANTIAL PERFORMANCE TO WHICH THE SURETY WAS ENTITLED TO PAYMENT QUANTUM MERUIT. FURTHER, THE SURETY WAS COMPELLED TO PAY THE CLAIMS OF ALL SUB-CONTRACTORS WITHOUT SUBROGATION.

The owner of Central Excavating Company testified that when it stopped work the contract, Phase One was ninety five percent (95%) complete. Ashwood never objected to this performance in any respect. This amounted to substantial performance for which the Surety should receive credit. Ashwood received this benefit, was compelled to pay nothing at any stage, and has been unjustly enriched. At least, if the surety is now compelled to pay the claims of subcontracts amounting to One Hundred Thirty Four Thousand Six Hundred Thirty Eight Dollars and Eighty Four Cents ($134,638.84) with interest, it, the surety, should be subrogated to their respective mechanic's liens in that amount. Otherwise Ashwood will receive ninety five percent (95%) performance and be compelled to pay nothing.

Arant on Suretyship, page 357, Section 79 states that it is universally recognized that the surety upon paying the creditor is entitled to be substituted to the creditor's position. The surety is treated as the assignee of the creditor. *Simpson on Suretyship,* page 206, and is entitled to all priorities enjoyed by the creditor. If the claims of subcontractors and materialmen are to be paid, the surety should take their mechanic's liens by assignment. *Stearns*:

Law of Suretyship 5th Ed. page 448, Section 11.4. This transfer is accomplished by operation of law, *Stearns*, page 439, and rests upon the principle of natural justice. Subrogation results by operation of law independent of contract. 50 *Ohio Jurisprudence* 2d 378, Section 3, and was expressly so held in *Maryland Casualty Co. vs. Gough*, 146 Ohio State 305. See also 50 *Ohio Jurisprudence* 2d 392, Section 14; *Restatement of Restitution*, Section 162; 50 *American Jurisprudence* 679 and 752 and 83 *Corpus Juris Secundum* 575, 611 and 699.

As to the right of subrogation of the surety in retained percentage of the contract it has been held that when a surety meets its obligation on its contract bond by paying the claims of laborers and materialmen, it subrogates to whatever rights the laborers and materialmen had in the retained fund to the extent necessary to reimburse it. *Western Casualty & Surety Co. vs. Brooks*, 362 Fed. 2d 486 citing *Pearlman vs. Reliance Insurance Co.*, 371 U.S. 132 at page 389.

One who substantially performs a building contract is entitled to payment, 11 *Ohio Jurisprudence* 2d 489; *Ohio Farmers Insurance Co. vs. Cochran*, 104 O.S. 427; 3 *Corbin on Contracts* 764, Section 701. Where breach goes only to part of the consideration, the plaintiff may recover in spite of the breach, 6 *Williston* 3rd Ed. 155. It is deemed "equitable to require the former to pay for what he gets," 13 *American Jurisprudence* 2d 44, Section 41.

Ashwood should be compelled to pay by set off or otherwise for the performance received. If the petitioner as surety be compelled to pay the claims of the subcontractors and materialmen, it should be entitled to the assignment of their liens. The latter will operate as no injustice to Ashwood, as all the liens were bounded by another surety.

CONCLUSION.

The propositions which the petitioner urges in this Petition are settled principles of suretyship as announced in Ohio and elsewhere. The federal question is found in the failure to apply the settled law of Ohio under the *Erie* doctrine. If the judgment below be permitted to stand, Ashwood, the obligee, although wholly unable to meet its contractual obligations, will be entitled to full performance, for which the Surety will receive nothing. To compel the surety to pay the claims of subcontractors and materialmen without the right of subrogation clearly enriches Ashwood unjustly. The manifest injustice is apparent. On these grounds we urge that the Petition be granted.

Respectfully submitted,

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APPENDIX 1.

CONCLUSIONS OF LAW OF TRIAL COURT.

(Filed December 20, 1967.)

In the instant case there are two main areas of conflict which are separate in themselves and which must be resolved by the Court in order to determine the rights of the parties in this case. The first area of conflict pertains to the dispute between United and Ashwood. The second pertains to the dispute between United and the various defendant subcontractors who provided materials and performed work at Brentwood for Timzan prior to April 1, 1965, and for United subsequent to the takeover agreement of said date.

For purposes of clarification and convenience, the Court will deal with and discuss these areas of conflict separately, even though they are interwoven to a great extent. The conflict between United and the defendant subcontractors of Timzan will be analyzed first.

There is clear and convincing evidence that the following defendants (who have counterclaimed against United in this declaratory judgment action) performed work services for Timzan and United at Brentwood for the respective amounts:

Central Excavating	$78,573.66
Arrow Builders Supply Co.	37,552.55
Air Compressor Rental Co.	12,000.00
Arturo Construction Co.	5,577.20
J. J. Turner, Inc.	935.63

These defendants each contend that United is obligated under its performance bonds to pay for services rendered at Brentwood prior to April 1, 1965, and that United is also obligated under the takeover agreement to pay for all services performed at Brentwood subsequent

to April 1, 1965. The evidence clearly establishes that United, by the terms of its bonds, did agree to "pay all persons who have contracts directly with the Principal [Timzan] for labor and materials." The evidence also clearly establishes that, pursuant to the takeover agreement, United did request the defendant subcontractors to continue to deliver materials and/or to perform services at Brentwood.

United has taken the position that it is not obligated, in any manner, to the various subcontractors who performed work and services at Brentwood. In support of this position, United has offered several legal conclusions which the Court now considers.

First, United argues that an unauthorized increase to one of the performance bonds, specifically the $60,000.00 rider to Bond No. CG-1097, effects a discharge of United from any liability under all of United's bonds. The Court will consider this particular question at greater length while analyzing the conflict between Ashwood and United, but suffice it to say at this juncture that the evidence of the case clearly indicates that Bond No. CG-1097 was increased in amount with United's approval and authorization and that United is estopped to deny the legal efficacy of the increase in bond coverage. The increase in bond coverage was authorized and is not a valid defense as against the defendant subcontractors who now seek recovery under the bonds.

Second, United contends that it escapes liability on its bonds since the defendant subcontractors who performed work at Brentwood perfected liens against Brentwood. United reasons that since the subcontractors of Timzan and United filed liens "for the full amount of the claims," such liens "served as full and adequate remedies at law." Even though United displays an inventive talent by

asserting such a premise, the premise is completely unsupported by law. If the courts were to adopt such reasoning, the purpose of a performance bond as supplied by a surety would be completely nullified. Ashwood's contracts with Timzan required Timzan to obtain a "100% performance bond" for the purpose of avoiding the possibility that unpaid subcontractors of Timzan would be required to perfect mechanics' liens upon Brentwood, thereby encumbering the property. United's contention in this respect is without merit.

As an additional defense to the various claims of the subcontractors, United maintains that no recovery can be had by the subcontractors either under the bonds or subsequent takeover agreement since there was a failure by certain of the subcontractors to obtain "inspection by the Cuyahoga County Sanitary Engineer as required by Section 711.101 of the Ohio Revised Code." The Court considers this contention to be irrelevant and without merit. No evidence was introduced at trial showing such "inspection" to be a condition precedent to the payment of the subcontractors.

Another of United's unique defenses against the defendant subcontractors is that the subcontractors who have counter-claimed have no right of direct action on the bonds since "only on public construction where the right is statutory is there a direct right of action on the behalf of laborers or materialmen." The Court considers United's contention as not well taken for the reasons which follow.

Each contract between Ashwood and Timzan specifically provided that "The Contractor [Timzan] shall furnish an acceptable surety bond * * * for the faithful performance of * * * this contract and for payment of all persons performing labor and furnishing materials in connection with this contract."

The law is well settled that "a surety * * * which by its contract, assures the faithful performance thereof by a principal * * * is liable to a materialman who furnishes material, in default of the principal's payment therefor." *Indemnity Co. v. Granite Co.*, 100 Ohio St. 373, syllabus 2 (1919). All subcontractors who rendered services and/or provided materials for Timzan were covered by the provisions of United's bonds and can maintain a direct action against United on such bonds. See also 11 O. Jur. 2d, Contractors' Bonds § 4, p. 186.

United interposes the baseless defense that the subcontractors cannot recover under the United bonds because "Ashwood, being unable to maintain against them, a fortiori, no other party can." The Court is not convinced that United correctly states the law even if the assumption is made that Ashwood cannot maintain an action against United upon the bonds. The correct principle of law is that the rights of laborers and materialmen to recover against a surety on a bond given by a contractor cannot be defeated by any act or omission of the obligee (Ashwood), which act or omission is not authorized or participated in by said laborers or materialmen. This principle holds even if the conduct or default by the obligee is such as to release the surety from liability to the obligee. See 11 O. Jur. 2d, Contractors' Bonds, § 8, pp. 191-2.

Apparently as an afterthought, United in its post-trial brief also argues that the defendant subcontractors are estopped by the statute of frauds from recovering for any work performed or materials provided at Brentwood subsequent to the takeover agreement of April 1, 1965. In the course of trial no evidence was introduced by any party which would support the contention that the statute of frauds is applicable to the instant case.

The Court considers the defenses offered by United

as against the defendant subcontractors to be without merit. Accordingly, it is the Court's conclusion that the defendant subcontractors shall recover for the amounts of their respective counterclaims.

The Court now turns to the area of conflict existing between United and Ashwood. Basically, the respective positions of the parties can be summarized as follows:

Pursuant to 28 U.S.C.A., Section 2201, United seeks a declaratory judgment relieving it of any and all liability under its performance bonds and subsequent takeover agreement. United advances two main reasons why the Court should make such a declaration:

> (a) There was an unauthorized material increase of United Bond No. CG-1097 which completely discharges United from any obligation upon its bonds;
>
> (b) At the time of the performance by Timzan on its contracts with Ashwood, Ashwood was "wholly insolvent and void of assets" so that "Ashwood Construction Company has no right to recover on either the underlying contract with Timzan Inc. or against United Bonding Insurance Company on the bond."

Ashwood has filed a counterclaim against United wherein it seeks to have the Court declare that United "wilfully and maliciously" breached its obligations to Ashwood under its bonds and subsequent takeover agreement. Further, Ashwood desires a declaration that it be permitted to recover "all damages proximately resulting from such repudiation or abandonment." Ashwood claims that the damages proximately resulting from such breach include:

(a) the net deficit between the cost of the Timzan contracts and Ashwood's estimate of cost of completion	$74,412.44
(b) the Price Bros. mechanic's lien paid by Ashwood	47,761.92

(c) the loan service fee incurred by Ashwood for the failure to take the Prudential loan commitment	19,312.50
(d) lost profits at Brentwood	584,200.00
(e) punitive damages	500,000.00

In order to resolve the Ashwood and United dispute, the Court must first of all consider whether or not United is correct in its contention that considering all events which culminated in this lawsuit United is completely free of liability. If the Court finds United's position is proper, then nothing further need be decided. But if the Court finds United cannot escape liability to Ashwood, it then must determine whether or not each of the aforesaid elements of damages claimed by Ashwood is proper.

Upon recalling the particular manner in which this case was tried, the Court is forced to observe the unrealistic points of view which the opposing parties, Ashwood and United, have assumed. On the one hand, United unequivocally asserts it is innocent of all wrongdoing in the events which transpired at Brentwood. On the other hand, Ashwood makes the impassioned plea that "because of the magnitude of [United's] acts and the flagrance of its wrongdoing" United must compensate Ashwood for breach of contract damages, lost profits, punitive damages, and attorney's fees. Counsel for both Ashwood and United appear to have abdicated their traditional role of offering information and cool analysis and have substituted in place thereof narrow, unsupported conclusions of law.

In support of its contention that it has no liability to Ashwood in the instant case, United has proffered a multitude of arguments and conclusions which it characterizes as complete defenses to any claim made against it by Ashwood.

United first contends that Ashwood's unauthorized raising of the amount of United Bond No. CG-1097 discharges United from any and all liability on the United bonds. Tangentially to that contention, United has injected numerous side issues which it claims lend support to its basic contention. For example, with respect to the increase of Bond No. CG-1097, United maintains that:

> (a) even though Donaldson of United testified that the rider to Bond No. CG-1097 was executed and a certified copy thereof was delivered to Ashwood, Ashwood still failed to prove:
>
> (i) the rider was executed;
>
> (ii) the rider was signed by the principal Timzan; and
>
> (iii) the premium on the rider was paid by Timzan.

Rarely has the Court seen a more perfect example of the doctrine of estoppel than applies to the situation of United's attempting to claim that the rider to Bond No. CG-1097 was unauthorized. The evidence clearly supports not only the fact that United did execute a rider to United Bond No. CG-1097 but also that United notified Ashwood of the execution of such rider with the express intention of inducing Ashwood to rely thereon. United errs in its contention that it was incumbent upon Ashwood to prove that the rider was executed; that the rider was signed by Timzan; and that the premium for the rider was paid by Timzan. United is estopped to deny that such did occur when by its own representations it led Ashwood to believe that such events had occurred. United's argument that it escapes liability on its bonds due to the alleged unauthorized increase of a bond amount is without merit.

United's second defense to Ashwood's counterclaim for damages is that Ashwood was insolvent and void of

assets and could not have paid Timzan under its contracts with Timzan even if such contracts had been fully performed by Timzan. United stresses that this defense is available because the doctrine of anticipatory breach of contract applies to the fact situation in the instant case. As stated in United's post-trial brief, at page IV-1:

> "* * * where it is apparent that when the time for performance shall have arrived, the promisor will not be in position to perform, the one whose obligation it is to proceed is relieved from performance. Applying this general statement to the parties, when it became obvious that ASHWOOD was not in financial position to pay when the performance was completed, UNITED was relieved from a tender of performance."

After a review of the evidence presented in this case by both United and Ashwood, the Court is convinced that a doctrine of anticipatory breach or anticipated failure of consideration cannot be relied upon by United as a defense to Ashwood's counterclaim. The Court bases its position on two grounds. First, United failed to introduce any evidence to support its contention that Ashwood would have been unable to pay Timzan or United after their completion of the Brentwood improvements. In fact, the existence of the loan commitment from Prudential creates a strong presumption that Ashwood would have paid Timzan or United had their work at Brentwood been completed. There is no relevant evidence to support United's assertion in its post-trial brief that "the proof is abundantly clear that Ashwood was hopelessly insolvent at the period in question, namely, May, 1965."

Second, even if United had proved that Ashwood's credit had become impaired "at the period in question, namely, May, 1965," which the Court deems that it did not, United still failed to offer any proof that either Timzan or United withdrew or refused to perform their obli-

gations because they were aware of such credit impairment at the time of the breach. The doctrine of anticipatory breach is so termed because at the time one contracting party breaches, he *anticipates* failure of the other contracting party to perform. The evidence in the case demonstrates that at the time of breach United did not have in mind a credit impairment or alleged insolvency of Ashwood and that any thoughts of such a defense arose only after the filing by Dover of a petition for reorganization under Chapter XI of the Bankruptcy Act in August of 1966.

Repeatedly during the trial and in its post-trial brief United characterized the assignment from Ashwood to Commercial Discount (Joint Ex. 1) and the notice thereof (United's Ex. 22), sent to Prudential by Commercial Discount, as destroying the effectiveness of the loan commitment to Ashwood by Prudential. The Court cannot concur with United's conclusion regarding the effect of the assignment. The assignment relates only to funds and proceeds arising out of loan closings incident to the eventual sale of homes in Brentwood and is irrelevant to the issues in this case. The testimony of Joseph R. Alvaro, resident attorney for Prudential, was that (a) the Prudential loan commitment remained in full force and effect until October 12, 1965, when it expired because the Brentwood improvements had not been completed; and (b) any assignment from Ashwood to Commercial Discount did not affect the commitment.

In its post-trial brief United also contends that United has no obligation to Ashwood under the takeover agreement of April 1, 1965, due to the fact that the takeover agreement is not supported by sufficient consideration. United offered no proof in support of such a contention at trial, and the contention is without basis or merit. The

April 1, 1965 takeover agreement's provisions recite sufficient and adequate consideration. Additionally, since the completion of a contract under default is a remedy accorded to the surety, the exercise of that remedy does not effect the surety's liability on the bond; and United, by entering into a takeover agreement, was not engaged in an independent contract so as to be released from its obligations under the bond. See Couch on Insurance 2d, Vol. 13, § 47:135, page 361.

United having failed to support its proposition that it is completely without liability to Ashwood on its counterclaim, the next issue to which the Court's attention must be directed is the amount of damages sustained by Ashwood as a result of United's breach.

United is bound under the terms of its bonds to "fully indemnify and save harmless the Obligee [Ashwood] from all cost and damage which the Obligee may suffer by reason of failure [to perform]," and is further bound to "fully reimburse and repay the Obligee all outlay and expense which the Obligee may incur in making good any such default * * *." Applying the above language of the bond to the proof, it is the Court's determination that Ashwood is entitled to recover on its counterclaim the total amount of actual and proximate damages suffered by Ashwood as a result of United's failure to honor its bonds and its breach of the April 1, 1965, takeover agreement.

In its post-trial brief United contends that Ashwood failed to properly mitigate its damages subsequent to United's breach. The evidence does not support such a contention, therefore this asserted defense is without substance or merit.

In attempting to determine the actual amount of damages Ashwood has suffered as a result of United's breach, the Court has scrutinized each element which Ash-

wood states it has proved in order to arrive at a total damage amount. The Court will analyze each damage claim which Ashwood makes in order to determine the propriety of Ashwood's total damages.

Ashwood first claims that it is entitled to recover the difference between the contract price of the Ashwood-Timzan contracts and the actual cost to complete such contracts. The estimated cost of the Ashwood-Timzan contracts is $311,000.00. Ashwood contends that the actual cost to complete such contracts is $385,412.44, and that Ashwood is entitled to recover the difference between such figures, or $74,412.44.

This Court recognizes the basic rule of damages in a contract action as stated by Williston on Contracts, Rev'd. Ed., Vol. 5, § 1363, page 3825:

> "Where the contractor fails to keep his agreement, the measure of the employer's damages, whether sought in an independent action or by recoupment or counterclaim, is always the sum which will put him in as good a position as if the contract had been performed. If the defect is remedial from a practical standpoint, recovery generally will be based on the market price of completing or correcting the performance, and this will generally be shown by the cost of getting work done or completed by another person."

In order to arrive at Ashwood's figure of $385,412.44 which it claims represents the actual cost of completion of the Ashwood-Timzan contracts, Ashwood includes amounts which represent salaries, travel and lodging expenses, air line ticket expenses, car rental bills, etc., incurred by numerous Ashwood and Dover executives and employees. Ashwood characterizes these items as "extra expenses and salaries" incurred as a result of Timzan's and United's breach and theorizes that such expenses would

not have been incurred by Ashwood had not the breach occurred. The Court does not consider such items to be properly includable in any figure representing the total cost of completion of the Ashwood-Timzan contracts. The salaries and expenses of Ashwood's and Dover's employees had to be paid by Dover regardless of the particular project of Dover and its subsidiaries which such employees happened to be concerned with and working on. These expenses for salaries, travel, and lodging cannot be charged to United as "expense which the Obligee [Ashwood] may incur in making good any such default."

United is liable for only those damages which were a natural and proximate result of United's breach, and the Court does not consider the salaries and expenses of Ashwood's and Dover's executives to be a proximate consequence of United's breach.

Included in the total of $385,412.44, which Ashwood claims represents the cost of completion of the Timzan contracts, is the $146,047.00 estimate of Engineer Kabbes covering additional work necessary to comply with the terms of the original Timzan contract. It should be remembered that the $146,047.00 figure is only an estimate, as was also the Timzan contract price of $311,000.00. In the spring of 1966 Ashwood disposed of a substantial portion of the property involved. Upon the evidence in this case, the Court concludes that the damage claim based on an estimated contract price and an estimated cost of completion is too speculative and not sufficiently definite to be accepted as a proper element of damage.

However, Ashwood is entitled to recover for certain other damages which were a proximate result of United's breach.

Timzan's and United's failure to fulfill their obliga-

tions at Brentwood by the specified date proximately resulted in Ashwood's damage in the sum of $19,312.50 representing the service or penalty fee of the Prudential commitment.

As the result of United's failure to honor its bonds and to pay Timzan's subcontractors, Ashwood is entitled to recover $7,958.00 in order to discharge the lien perfected against Brentwood by Empire Excavating Company who performed work and services at Brentwood for Timzan but who failed to appear as a party in this lawsuit.

Ashwood also is entitled to be reimbursed for the amount of $47,761.92 which was paid to Price Bros. in settlement of its lien filed upon Brentwood. It is generally held that "an owner is entitled to recover from a contractor or the surety on the contractor's bond, the amount paid or agreed to be paid by the owner to third persons, in order to avoid a mechanic's lien for labor or material furnished the contractor." See annotation "Owner's right to recover from contractor or surety on his bond amount paid or agreed to be paid by former to third person, in order to avoid mechanics' liens for labor or material furnished to contractor." 134 A.L.R. 314.

With regard to the remaining liens, all lienholders have counterclaimed in the instant suit and, as explained hereinbefore, can recover against United for the respective amounts of such liens. Since these lienholders are entitled to direct judgments against United, the amounts of such liens are not properly includable in any damage award granted to Ashwood.

Ashwood is entitled to recover as a proper damage claim the amount of $7,200.00, which is the bond premium of Progressive Mutual Insurance Company. The bond secured from Progressive Mutual indemnified Women's Federal and Lawyers Title Insurance Company from any loss

which would arise to them by reason of mechanics' liens filed against Brentwood. Had United honored its bonds, the various liens would not have been filed and the necessity for such a bond would not have arisen.

Ashwood is entitled to recover as a proper damage claim the amount of $15,750.00 which was paid to Women's Federal for loan and appraisal fees. If Timzan had performed its contracts with Ashwood as agreed, Ashwood would not have had to seek additional financing which would include release of periodic payments as work progressed at Brentwood; and if Ashwood had not been forced to seek the additional financing due to Timzan's and United's breach, the expense of $2,400.00 for title and escrow fees paid to Lawyers Title Insurance Company would not have been incurred by Ashwood. Consequently the $15,750.00 and $2,400.00, for a total of $18,150.00, were damages suffered by Ashwood as a proximate and direct result of United's and Timzan's breach.

The Court has for consideration the question of whether or not Ashwood can successfully recover, as allowable damages proximately resulting from United's breach, profits lost by Ashwood due to its alleged inability to build and sell homes at Brentwood. Basically, Ashwood's contention regarding its claim for lost profits can be stated as follows:

> (a) prior to the letting of contracts for any improvements at Brentwood, Ashwood solicited prospective purchasers of new homes to be constructed at Brentwood;
>
> (b) response was favorable, and contracts relating to underground improvements at Brentwood were entered into with Timzan;
>
> (c) Ashwood entered into purchase agreements with 82 prospective home purchasers at Brentwood;

(d) the estimated profit Ashwood would have received on each home built at Brentwood would have been $2,300.00;

(e) due to Timzan's and United's failure to complete the underground improvements at Brentwood, homes could not be built at Brentwood and no profits on the sale of such homes could be realized;

(f) Ashwood also would have constructed and sold homes on all remaining sublots at Brentwood, the estimated profit on the sale of each home also being $2,300.00;

(g) Ashwood is entitled to recover $2,300.00 for each of the 82 homes contracted for, or the total sum of $188,600.00;

(h) Ashwood is entitled to recover $2,300.00 for each of the remaining 172 sublots on which homes would have been constructed, or a total of $395,600.00.

In support of its above-stated position, Ashwood relies almost exclusively on the case of *Gilmore v. Cohen*, 95 Ariz. 34, 386 P.2d 81, 11 A.L.R. 3d 714 (1963). There the plaintiffs were given options to buy, at stated prices, thirteen parcels of land belonging to the defendants. Six of these parcels had changed hands when the defendant refused to make further sales. Plaintiffs instituted suit and the issue of damages arose. The plaintiffs sought to recover lost profits resulting from the breach since they had built homes on the six parcels which had changed hands and had sold them for substantial profits. Plaintiffs contended that like profits would have been realized on the remaining tracts if they had gained possession of the parcels and built homes thereon. The Supreme Court of the State of Arizona limited plaintiffs' recovery to nominal damages, however, holding that the plaintiffs failed to establish with the requisite degree of certainty

what their actual profits would have been on the remaining parcels.

In spite of the fact that the above case held against the plaintiffs who sought to recover lost profits, Ashwood stresses that *Gilmore v. Cohen, supra*, sets forth guidelines and standards by which lost profits can be recovered. Ashwood argues that the court in *Gilmore* awarded only nominal damages since "the amount of plaintiffs' damages could not be ascertained from the evidence with any degree of reasonable certainty." Ashwood also argues that its evidence relating to lost profits (Ashwood's Exs. LLL, MMM, NNN, and the testimony of Henry Lefkowitz) was "clear and convincing" and completely satisfied the requirement, as set forth in *Gilmore*, of providing "some basis for estimating the loss" whereby an "approximately accurate estimate [is] possible."

Before deciding whether or not Ashwood did establish the amount of its lost profits "with any degree of reasonable certainty," the Court must consider if Ashwood is entitled to recover lost profits regardless of whether or not the amount of the profits was established with "reasonable certainty."

Williston on Contracts, Rev'd. Ed., Vol. 5, § 1345, at pp. 3776-8 states:

> "Though any breach of contract entitles the injured party at least to nominal damages, he cannot recover more without establishing a basis for an inference of fact that he has been actually damaged. A mere possibility that the plaintiff might have made a profit if the defendant had kept his contract will not justify damages based on the assumption that the profit would have been made. But though there must be evidence of substantial damage in order to justify recovery of more than a nominal sum, the exact amount need not be shown. Where substantial dam-

age has been suffered, the impossibility of proving its precise limits is no reason for denying substantial damages altogether. Under this principle, profits that the plaintiff would have made if the contract had been carried out may be recovered if their loss was a proximate and natural consequence of the breach, and any reasonable method of estimation is possible, even though the exact amount of profit to have been anticipated is necessarily uncertain. On the other hand, 'such damages cannot be recovered when they are remote, speculative, hypothetical, and not within the realm of reasonable certainty. The nature of the business or venture upon which the anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of facts. When the elements, upon which the claim for prospective profits rests, are numerous and shifting contingencies whose relation to the wrong complained of is problematical, and such profits are not provable with assurance as a trustworthy result of the alleged cause, then there can be no recovery. Manifest ambiguities in ascertaining what would have been the course of events in the face of complicated factors, under circumstances which have never come to pass, and inherent difficulties in calculating the amount of prospective gains prevent the recovery of damages. Pure chances lying between the alleged wrong and the anticipated profits, dependent upon unsettled conditions, render impracticable the assertion of cause and effect.' "

Applying the standard set forth by Williston as quoted above, Ashwood is entitled to lost profits only if such are a "proximate and natural consequence of the breach * * *." Also, Ashwood must establish that the "nature of the business or venture upon which the anticipated profits are claimed must be such as to support an inference of definite profits grounded upon a reasonably sure basis of fact."

Further, Ashwood must show in its claim for lost profits that there are no "pure chances" lying between Timzan's and United's alleged wrongs and the anticipated profits, which chances are "dependent upon unsettled conditions" and "render impracticable the assertion of cause and effect."

It is the Court's view that Ashwood has failed to sustain this burden. Further, there are numerous analogous situations where other courts have denied lost profits due to the breach of a contractor, holding that such lost profits are not the "proximate and natural consequence" of the breach.

In *Friedland v. McNeil,* 33 Mich. 40 (1875), a contractor was responsible for the construction of only a part of the work involved in the eventual completion of the entire building, to wit, the masonry work involved in the building of a church. The contractor failed to complete his work within the stipulated time and the church officials sought to hold the contractor for the loss of pew rents during the period of inexcusable delay. In rejecting the claim, the court said:

> "The contract upon which suit was brought was not one the completion of which was to put the building in condition for the renting of pews. A large amount of other work would still remain to be done, and large expenditures to be made, with which this contractor would have no concern whatever; and the building might never be put in condition for the renting of pews and yet he be in no way responsible. It can never be said that the loss of rents is a necessary, natural or probable result of a particular default, when had no default occurred, the necessary conditions to rent would still be wanting, and might never be supplied. Any claim against this contractor for damages resulting from loss of rents must assume that the trustees had the ability and inclination to pro-

ceed at once to complete the church, and were only delayed by the contractor's default; but damages so remote and contingent would require to be specially claimed by the pleadings, if recoverable at all, which is doubtful."

The rationale behind the decision of *Friedland v. McNeil, supra,* is best explained by the following quotation from page 1242 of an annotation in 125 A.L.R. 1242 covering "Measure of owner's damages for delay of contractor, or breach resulting in delay, where performance of other contract or work was necessary to complete project":

> "Where delay in constructing a building or other improvement, or a breach of contract resulting in delay, is that of the general contractor, or of a contractor whose work will complete the project, it seems that loss of the use of the improvement during the period of the delay is clearly the ordinary, natural result of the contractor's default and is, therefore, to be regarded as within the contemplation of the contracting parties in so far as concerns the basic rule of damages applicable to breaches of contract. * * * But where that which is contracted for is merely a part of the construction or building project, and not the last part of it, peculiar questions arise as to the consequential damages recoverable by the owner in case of delay in the performance of such contract; for, due to want of funds or change of purpose or other cause, the project may not actually have been completed, or actual completion may have been, or still may be, uncertain, or may be problematical as to time, and moreover, the particular contract may be of such a comparatively minor character as to give rise to the inquiry whether the contractor, for his delay in performance or breach causing delay, is to be charged with consequential damages of a magnitude corresponding to the importance of completion of the entire project."

The Timzan contract with Ashwood as well as the takeover agreement of United dealt with only a portion of the Brentwood project. Even if Timzan and United had performed on the contracts, the project at Brentwood required substantial work and expenditure of funds before its completion to a point of making sales and determining any profits. Before Ashwood would realize any profits at Brentwood from the sale of homes, certain other work and improvements had to be completed and homes had to be constructed. In fact, no homes were ever constructed at Brentwood other than the original model homes. It is conceivable that "due to want of funds or change of purpose or other cause" Ashwood would not have constructed homes at Brentwood even had the Timzan contracts been wholly performed. Ashwood's claim for lost profits is not only too remote to be a proper element of damages in this case, but also is contingent upon Ashwood's own performance. United and Timzan agreed simply to construct certain underground improvements at Brentwood. They can be charged only for damages "of a magnitude corresponding to the completion of the entire project."

Such damages do not include total responsibility for the failure of the Brentwood project. Ashwood is entitled to be put in as good a position as if the contract had been performed, but it is not entitled to charge off to United the entire loss incurred by Ashwood at Brentwood, including any profits which hopefully would have been made had the project been a success.

Ashwood also seeks to have this Court hold that "because of the magnitude of its acts and the flagrance of its wrongdoing, United Bonding ought to be ordered to pay the sum of $500,000.00 as and for punitive damages," and argues that the "shameful and deceitful conduct of United Bonding" justifies an award of punitive damages.

The evidence establishes that United wilfully and irresponsibly failed to honor its bonds and the subsequent takeover agreement of April 1, 1965. The Court recognizes that in some instances a minority of courts have allowed the plaintiff in a contract action to recover exemplary or punitive damages in excess of compensation for the actual harm caused by the wrong. But such cases are in a decided minority and Restatement of Contracts, § 342, specifically states that punitive damages are not permissible in contract actions. As stated by Judge Burger in *Brown v. Coates*, 253 F.2d 36 (D.C. Cir. 1958), at page 39:

> "For breaches of contract standing alone, punitive damages are generally not recoverable. Moreover, it is axiomatic that punitive damages are 'not favored.' Some courts have refused to allow the imposition of punitive damages in *any* contract actions, regardless of the types of contracts involved or the circumstances surrounding their breach."

The Court is not so shocked by the "outrageous irresponsibility" of United Bonding's conduct as to feel that an award of punitive damages is necessary or proper.

Ashwood also seeks to recover "its reasonable attorneys' fees" arising from this action. In the absence of an express provision to the contrary in the bond, or of an express statute therefor, no right to recover attorneys' fees exists with respect to the bonds of private building contractors. See *Basic Refractories, Inc. v. Bright*, ____ Nev. ____, 298 P. 2d 810, 59 A.L.R. 2d 457 (1956); and Couch on Insurance 2d, Vol. 16, § 58:9, page 13.

It is the Court's determination that United shall pay the defendant subcontractors the amounts set forth in their respective counterclaims totaling $134,639.04, with interest at 6% from July 31, 1965, in order to discharge the liens such subcontractors perfected against Brentwood. The

Court further determines that United shall pay to Ashwood the sum of $7,958.00 in order to discharge the Empire Excavating lien, and the sum of $47,761.92 for reimbursement of the amount paid by Ashwood to discharge the Price Bros.' lien. Said $47,761.92 is to bear interest at 6% from September 9, 1965, the date Ashwood settled and paid the lien.

Since United has instituted an action for a declaratory judgment pursuant to 28 U.S.C. § 2201, the Court must "declare the rights and legal relations of any interested party seeking such declaration." Accordingly, it is necessary to determine what "rights and legal relations" are created in United by its payment of the sum of $190,358.96 as above set forth.

United, by its payment under its bonds, becomes subrogated to the rights of Timzan and can enforce any rights Timzan may have against Ashwood. As stated by Couch on Insurance 2d, Vol. 16, § 61:382, at pages 437-8:

> "Where a surety on a performance bond of any nature pays an obligation for which its principal is liable, it becomes subrogated thereby to the claim which it has so paid."

This principle is defined in *American Surety Co. of New York v. Robinson,* 53 F.2d 22 (1931), wherein the court stated, at page 23:

> "Subrogation is an invention of equity whereby through a supposed succession to the legal rights of another a loss is put ultimately on that one of the parties before the court on whom it ought equitably to fall. It is freely applied in favor of a surety who discharges his principal's obligation, or makes good his default. It operates to enable the surety to enforce all his principal's rights of reimbursement against others, and all the rights of the creditor against the principal and all securities held for the obligation.

> By analogy to the principle of insurance law whereby an insurer paying a loss may go against even a tort feasor who caused it, the surety may often be subrogated to the independent rights of action of the creditor against third parties."

In other words, United, upon payment of the obligations due the subcontractors, may "enforce all his principal's rights of reimbursement against others." In determining the "rights and legal relations" of United, the Court considers it imperative to resolve the question of whether or not United is entitled to be reimbursed by Ashwood for any payment of the $190,358.96 in subcontractors' claims.

The facts in the instant case establish the following:

(a) Ashwood contracted with Timzan for the installation of certain underground improvements at Brentwood.

(b) By the terms of the contract Timzan was to be paid nothing until "all subject work is completed and inspected and approved by all governing municipal authorities." (see Addenda # 1 to Ashwood's Exs. KK and JJ.)

(c) United provided Timzan with performance bonds whereby it agreed to "pay all persons who have contracts directly with the principal for labor or materials" if the principal fails to "faithfully perform the contract on his part."

(d) Timzan began performance of its contracts, but due to many difficulties unforeseen by both Timzan and Ashwood was unable to "faithfully perform the contract on his part" and several subcontractors of Timzan remained unpaid for work performed.

(e) Upon Timzan's failure, United agreed to take over the performance of Timzan's obligations under the same terms of the contracts. As part of the takeover agreement Timzan waived "any claim, de-

mand, action and/or cause of action for the payment of any funds due it from ASHWOOD," and further agreed that "any such claim, demand, action and/or cause of action is hereby set over and assigned to UNITED." It was further agreed that Ashwood was to pay United "in accordance with the payment schedule set forth in the various Construction Contracts such funds and in such amounts as ASHWOOD would have been obligated to pay TIMZAN." (See para. 5, Joint Defts.' Ex. 22.)

(f) Pursuant to such agreement United took over for Timzan at Brentwood and continued to fulfill Timzan's obligations under its contracts.

(g) United shortly after taking over for Timzan wilfully and intentionally breached its takeover agreement and announced its intentions to not honor its performance bonds.

It is a well-supported rule that where a party has partially but not substantially performed his contract and, under the contract, complete performance by one party is to precede payment by the other, no recovery can be had by the defaulting party either upon an implied assumpsit or upon a quantum meruit if the default was intentional and wilful. See 11 O. Jur. 2d Contracts, § 233; Williston on Contracts, Vol. 5, § 1475.

But the rule is also well settled in Ohio that "the party in default cannot recover either on the contract or in assumpsit for benefit bestowed, but is entitled to credit for such benefit upon any damage resulting from his default." See *Mays v. Hartman,* 81 Ohio App. 408, 77 N.E. 2d 93.

The reasoning behind such rule is set forth in *Kirkland v. Archbold,* 68 Ohio L. Abs. 481, 113 N.E. 2d 496, wherein Judge Skeel of the Cuyahoga County Court of Appeals stated, at page 485:

"The result of decisions which deny a defaulting contractor all right of recovery even though his work has enriched the estate of the other party to the contract is to penalize the defaulting contractor to the extent of the value of all benefit conferred by his work and materials upon the property of the other party. * * *

"An ever-increasing number of decisions of courts of last resort now modify the severity of this rule and permits defaulting contractors, where their work has contributed substantial value to the other contracting party's property, to recover the value of the work and materials expended on a quantum meruit basis, the recovery being diminished, however, to the extent of such damage as the contractor's breach causes the other party."

If the Court were to declare that United is entitled to recover back against Ashwood that portion of the $190,-358.96 which represents "the value of all benefit conferred" to Ashwood by work upon Brentwood, United must have proved by a preponderance of the evidence that Ashwood did receive a substantial benefit as a result of Timzan's and United's partial performance of their contracts.

In its answer to the Ashwood counterclaim, United generally denies the allegations of such counterclaim and, contrary to Rule 8(c) of the Federal Rules of Civil Procedure, does not plead the affirmative defense of part performance which, if proved, would allow it to set off against a $190,358.96 judgment of this Court the amount of money representing "the value of all benefit conferred" upon Ashwood resulting from Timzan's and United's partial performance. Additionally, United failed at trial to offer any proof whatsoever that would support a claim that Ashwood did receive "substantial benefit" from any work which was done at Brentwood.

The withdrawal of Timzan, United's repudiation of liability under its bonds and takeover agreement, the expiration of the Prudential commitment, and the proven fact that a portion of the work performed by Timzan and United failed to meet the specifications in the Timzan contracts, which would have to be corrected at great expense to Ashwood, are conclusive proof that Ashwood did not receive *a substantial benefit* as a result of work performed by Timzan or United.

United's position throughout this lawsuit has been characterized by its insistence that it owes no obligation whatsoever. The Court has concluded that this illusory contention is completely unsupported by the evidence, and therefore cannot permit United to prevail upon any equitable doctrine of subrogation which it has neither alleged nor proved.

The purpose of subrogation is to allow one party to succeed to the legal rights of another so that the loss can ultimately fall "on that one of the parties before the court on whom it ought equitably to fall." It is the Court's decision that any loss resulting from payment of the subcontractors' liens "ought equitably to fall" on United since United failed totally to offer any evidence to the Court to the contrary.

In light of the foregoing analysis, which the Court deems to be necessary to meet the numerous issues in this rather complicated case, the Court summarizes its conclusions as follows:

1. The Court has jurisdiction of the parties and of the subject matter of this suit.

2. Under its Bonds Nos. CG-1097, CG-1098, and CG-1099 and the takeover agreement of April 1, 1965, United is bound to pay all persons who performed work

at Brentwood for Timzan and United for the reasonable value of such work.

3. Central Excavating performed work and services at Brentwood for Timzan and United, the reasonable value of which was $78,573.66, and is entitled to judgment against United for such amount with interest at the rate of six per cent (6%) per annum from July 31, 1965.

4. Arrow Builders Supply performed work and services at Brentwood for Timzan and United, the reasonable value of which was $37,552.55, and is entitled to judgment against United for such amount with interest at the rate of six per cent (6%) per annum from July 31, 1965.

5. Air Compressor Rental performed work and services at Brentwood for Timzan and United, the reasonable value of which was $12,000.00, and is entitled to judgment against United for such amount with interest at the rate of six percent (6%) per annum from July 31, 1965.

6. Arturo Construction performed work and services at Brentwood for Timzan and United, the reasonable value of which was $5,577.00, and is entitled to judgment against United for such amount, with interest at the rate of six per cent (6%) per annum from July 31, 1965.

7. J. J. Turner performed work and services at Brentwood for Timzan and United, the reasonable value of which was $935.63, and is entitled to judgment against United for such amount with interest at the rate of six per cent (6%) per annum from July 31, 1965.

Under United's Bonds No. CG-1097, CG-1098, and CG-1099 and the takeover agreement of April 1, 1965, Ashwood is entitled to judgment against United for all damages which proximately and naturally resulted from United's breach of said bonds and the takeover agreement. These damages are itemized as follows:

(a) the penalty fee Ashwood was required to pay Prudential for failure to take the Prudential loan commitment $19,312.50

(b) the amount necessary for Ashwood to discharged the Empire Excavating lien ---------- 7,958.00

(c) the bond premium of Progressive Mutual Insurance Company ------- 7,200.00

(d) the amount paid by Ashwood to Women's Federal for loan and appraisal fees ---------- 15,750.00

(e) the amount paid by Ashwood to Lawyers Title for title and escrow fees --- 2,400.00

(f) the amount paid by Ashwood in settlement of the Price Bros. lien -------- 47,761.92

Judgment will be rendered in favor of Ashwood and against United in the total sum of $100,382.42. Judgment also will be rendered in favor of Ashwood and against United for interest at the rate of six per cent (6%) per annum on the sum of $47,761.92 from September 9, 1965, and for interest at the rate of six per cent (6%) per annum on $44,662.50 from October 12, 1965. Since Ashwood has not paid the Empire Excavating lien, no interest will be awarded upon the amount of that lien, to wit, $7,958.00.

The foregoing memorandum is adopted as the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Judgment will be entered in accord herewith and Ashwood is instructed to prepare the entry.

GIRARD E. KALBFLEISCH,
Chief Judge.

APPENDIX 2.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Decided August 11, 1969.)

Before: WEICK, Chief Judge, McCREE, Circuit Judge and McALLISTER, Senior Circuit Judge.

PER CURIAM. This case involves questions as to the liability of the surety, United Bonding Insurance Company (United), to its obligee, Ashwood Construction Company (Ashwood), and to subcontractors who furnished labor, material and necessary tools to the principal, Timzan, Inc. (Timzan), for certain construction in connection with the Brentwood Subdivision in Cuyahoga County, Ohio.

United was surety on bonds which were conditioned not only for the faithful performance of the construction contracts by the contractor Timzan but also for the payment of "all persons who have contracts directly with the Principal [Timzan] for labor and materials."

The contractor Timzan defaulted and United, Ashwood and Timzan entered into an agreement whereby United took over the performance of the construction contracts and agreed "to assume all of the obligations of Timzan under its various Construction Contracts."

About five weeks after entering into the take-over agreement, United advised Ashwood by telegram that the performance bonds which it had executed were "null and void from their inception" and it repudiated its liability not only on the bonds but also under the take-over agreement. On June 14, 1965, United filed its complaint for declaratory judgment in the District Court seeking a determination of its rights and liabilities.

The District Judge, who heard the case without a jury, held United liable under the bonds and the take-over agreement. He awarded damages to Ashwood for wilful

breach of contract by United and rendered judgment against United in favor of subcontractors and persons who furnished labor, material and necessary tools in connection with performance of the contracts. United has appealed and Ashwood cross-appealed.

We have reviewed the extensive findings of fact of Chief Judge Kalbfleisch and find that they are supported by substantial evidence and are not clearly erroneous. Rule 52(a), Fed. R. Civ. P. His conclusions of law are correct.

The judgment of the District Court is therefore affirmed.

APPENDIX 3.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed September 4, 1969.)

Before WEICK, Chief Judge, McCREE, Circuit Judge, and McALLISTER, Senior Circuit Judge.

Upon consideration, it is ORDERED that the petition for rehearing be and it is hereby denied.

Entered by order of the Court.

CARL W. REUSS,
Clerk.

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In the Supreme Court of the United States

No. 901.
OCTOBER TERM, 1969.

UNITED BONDING INSURANCE COMPANY,
Petitioner,

vs.

ASHWOOD CONSTRUCTION COMPANY, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION.

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In the Supreme Court of the United States

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TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT.

JOINT BRIEF OF RESPONDENTS IN OPPOSITION.

STATEMENT OF THE CASE.

This case comes before the Court upon the petition of United Bonding Insurance Company (United) for a writ of certiorari from the judgment of the United States Court of Appeals for the Sixth Circuit entered August 11, 1969, affirming the judgment of the United States District Court for the Northern District of Ohio, Eastern Division. The case involves questions of liability of the surety, United, to its obligee, Ashwood Construction Company (Ashwood) and to sub-contractors who furnished labor, material and necessary tools to the principal, Timzan, Inc. (Timzan) for certain construction in connection with a housing development in the Brentwood Subdivision in Cuyahoga County, Ohio.

On December 11, 1964, Ashwood entered into three unit price contracts with Timzan for the improvement of

91 sublots in Brentwood Subdivision. One of the contracts was for site clearing and grading, another was for the installation of water lines and sanitary and storm sewer mains, and the third was for the construction of sidewalks, roads and curbs. (Ashwood Exhibits II, JJ and KK) Each contract contained a date for completion and liquidated damages at a daily rate in the event that work was not completed on or before the stipulated date.

In addition, each of the three contracts provided that:

> "The contractor shall furnish an acceptable surety bond in an amount at least equal to 100 per cent of the contract price as security. For the faithful performance of this contract and for payment of all persons performing labor and furnishing materials in connection with this contract." (Ashwood Exhibit LL)

Payment of the contracts was guaranteed in writing by Ashwood's parent company, Dover Construction Company (Dover), and was not due until all work was completed. (Ashwood Exhibit CC)

On or about December 16, 1964, United issued and delivered to Ashwood three separate bonds to guarantee the performance of Timzan under each of its aforesaid contracts with Ashwood. (Joint Defendants' Exhibits 2, 12 and 13) Each of the bonds was conditioned not only for the faithful performance of the construction contracts by Timzan, but also for the payment of "all persons who have contracts directly with the principal [Timzan] for labor and materials."

The bond to guarantee Timzan's performance under its contract for installation of water lines, sanitary and storm sewer mains was in the sum of $161,000.00, and upon delivery thereof, Ashwood complained that its face amount was insufficient to cover the total amount of an-

ticipated cost for the installation of water lines and sanitary and storm sewer mains, and requested a bond in the sum of $233,000.00, which was Ashwood's estimate of the cost of such installation. After conferences between Ashwood and Timzan, it was agreed that a bond in the sum of $221,000.00 would be sufficient to cover the total cost of installation of water lines and sanitary and storm sewer mains, whereupon on or about January 25, 1965, United issued a rider whereby the penal sum of said bond was increased from $161,000.00 to $221,000.00. (R. 1657-72) On March 18, 1965, in response to the request of Ashwood, United delivered a certified copy of the rider to the aforesaid bond, which rider was signed in the original and to which the seal of United was affixed. (Ashwood Exhibit E) (Joint Defendants' Exhibit 7)

On or about March 26, 1965, Timzan defaulted in its obligations under each of its contracts with Ashwood. (R. 1672-73, 1912) (Joint Defendants' Exhibit 16)

On April 1, 1965, United, Ashwood and Timzan entered into an agreement in writing under the terms of which Timzan agreed to withdraw from its contract, and United agreed to assume all of the obligations of Timzan under the latter's contract with Ashwood. (Joint Defendants' Exhibit 22) In partial consideration for such agreement on the part of United, said agreement provided for an extension of the date for completion of the contract for installation of water lines and sanitary and sewer lines.

In accordance with the terms of the aforesaid "Takeover Agreement," United did enter into various agreements with contractors and materialmen to complete the installation of improvements in Brentwood Subdivision. (R. 1017-49) Thereafter, on May 7, 1965, United informed Ashwood that it considered "their Bonds No. CB (sic.)

1097-1098 and 1099 null and void from their inception," and repudiated its liability not only on the bonds but also under the Takeover Agreement. (Joint Defendants' Exhibit 8)

On June 14, 1965, United filed its complaint for declaratory judgment in the District Court seeking a determination of its rights and liabilities. Ashwood filed a counterclaim seeking compensatory and punitive damages against United, and the various sub-contractors and materialmen employed by Timzan and United filed counterclaims against United seeking payment of the respective amounts due them for labor, materials and tools furnished for the improvement of Brentwood Subdivision.

The trial commenced on June 19, 1967 before the Honorable Gerard E. Kalbfleisch and concluded on July 14, 1967.

At the time the trial commenced, only one paragraph of the original complaint formed the basis for the declaratory judgment of non-liability sought by United, namely Paragraph 18, which stated that:

> "(18) At a date unknown to the plaintiff the defendant Ashwood Construction Company, increased that portion of the contract of construction known as Phase 1 from One Hundred Sixty-One Thousand Dollars ($161,000.00) to Two Hundred Twenty-One Thousand Dollars ($221,000.00) without the authorization or consent of this plaintiff."

The complaint remained unchanged until after the commencement of the trial, when, on June 29, 1967, United, over objection of Ashwood, was permitted to amend its complaint in order to interject as an issue for the first time the solvency of Ashwood. On June 30, 1967, United filed an amended complaint in which it

added certain language to Paragraph 18 and added a new Paragraph 20, which paragraphs then provided as follows:

> "(18) At a date unknown to the plaintiff the defendant Ashwood Construction Company, increased that portion of the contract or bond requirement of construction known as part of Phase 1 from One Hundred Sixty-One Thousand Dollars ($161,000.00) to Two Hundred Twenty-One Thousand Dollars ($221,000.00) without the authorization or consent of this plaintiff."
>
> "(20) That at the time performance of the various contracts became due, Ashwood Construction Company was insolvent and unable to meet its obligations as they matured."

Thus, the complaint, as amended, raised but two factual issues, the first being whether Ashwood at any time changed either the amount or the bonding requirements of its contract with Timzan for the installation of water lines and sewer mains, and the second being whether Ashwood was insolvent and unable to meet its obligations as they matured at the time performance of its various contracts with Timzan became due.

The Court expressly found that neither the amount of Ashwood's contract with Timzan or its bond requirement had been increased and that Ashwood was not insolvent at any time relevant to the issues of this case.

On January 10, 1969, judgment was entered against United and in favor of Ashwood and the various subcontractors and materialmen who furnished labor, materials and necessary tools for the improvement of Brentwood Subdivision.

In addition, the Court ordered that by reason of United's willful and intentional breach of its obligation

and its failure to confer any substantial benefit on Ashwood by reason of the partial performance of its contracts, United was barred from subrogation and from any recovery whatsoever against Ashwood.

The Court refused to award Ashwood compensatory damages for lost profits and certain other expenses allegedly incurred by it as the result of United's default, and refused to award Ashwood punitive damages.

United appealed the judgment of the District Court to the United States Court of Appeals for the Sixth Circuit. Ashwood cross-appealed for compensatory damages for lost profits and punitive damages. The Court of Appeals affirmed the judgment of the District Court, finding that the extensive findings of fact of the District Court were supported by substantial evidence and that its conclusions of law were correct. (Petition for Writ of Certiorari, *Conclusions of Law*, p. 54)

THE WRIT SHOULD BE DENIED.

Although United bases its request for a writ of certiorari in this case upon the alleged failure of the Courts below to apply the law of Ohio in accordance with the doctrine of *Erie R.R. Co. v. Thompkins,* 304 U.S. 64, 58 S. Ct. 817, 82 L. ed. 1188, it is clear from an examination of the reasons assigned by United for the granting of a writ of certiorari that United's basic disagreement is with the findings of fact by the District Court, and not the application of the law to those facts.

I. The District Court Properly Refused to Grant United's Motion to Dismiss Ashwood as the Real Party in Interest.

To support its claim that Ashwood is not the real party in interest in this case, United at page 6 of its brief, quotes out of context a portion of one sentence from a letter agreement dated May 7, 1965, in order to create the illusion that on the aforesaid date Ashwood made a "general assignment" of all of its assets to Commercial Discount Corporation.

The portion which United quotes in its brief is as follows:

> " 'We hereby grant you a security interest in *and assign and pledge to you* all present and future accounts, chattel papers, *contract rights.* * * *' (Emphasis supplied.)"

The full sentence from which the above quotation was excerpted is as follows:

> "We hereby grant you a security interest in and assign and pledge to you all present and future accounts, chattel paper, contract rights *and instruments which are collateral security for the loans and advances made under the agreement between us dated November 2,*

1964, as additional security for all notes, loans and advances hereunder." (Joint Exhibit 1-V)

The language which is italicized above is that which has been omitted by United from the quotation which appears in its brief.

The "present and future accounts, chattel paper, contract rights and instruments which are collateral security for the loans and advances made under the agreement between us dated November 2, 1964," are fully and explicitly set forth in the agreement between United and Commercial Discount Corporation, dated November 2, 1964, which agreement provides that:

> "We are engaged in the business of purchasing and selling land and selling and contracting for the construction of homes on such land and in the course of our business we acquire from the purchasers of such land and buildings purchase money, notes and second mortgages made by such purchasers. We desire to offer you our note to evidence loans to be made to us from time to time. To secure such note we will assign and transfer to you on your form of collateral schedule, in the form of Exhibit 'B' attached hereto and made a part hereof acceptable notes, second mortgages and other types of secured deferred payment paper (all hereinafter referred to as 'Accounts') which shall have been acquired by us in the normal course of our business in the states of Illinois, Ohio and Pennsylvania and such other states as may from time to time be approved by you." (Emphasis added) (Joint Exhibit 1-A)

It is apparent that Ashwood did not "pledge and assign all of its assets," but rather "acceptable notes, second mortgages and other types of secured deferred payment paper" acquired by Ashwood in the normal course of its business, namely the sale to purchasers of homes on which Ashwood acquired notes and second mortgages

from such purchasers in consideration for the sale of such homes.

United filed its motion to dismiss Ashwood after the case had been fully tried and submitted to the Court. It was not timely filed and was without merit.

In addition, the relief sought by United, namely the dismissal of Ashwood, was not available under Rule 17 of the Federal Rules of Civil Procedure, which provides that:

> "No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

II. As of May 15, 1965, Ashwood Was Solvent and Was Able To Meet Its Financial Obligations As They Appeared.

As previously noted, when United repudiated its liability under its bonds, it asserted only that the bonds were "null and void from their inception." That was on May 7, 1965. On June 14, 1965, when United filed its original complaint seeking a declaratory judgment in the District Court, it alleged as the sole excuse for its alleged non-liability that the contract of construction for which the bond was issued had been raised by Ashwood from $161,000.00 to $221,000.00. There was no mention in the original complaint of the alleged adverse financial condition of Ashwood. On August 16, 1966, an involuntary petition in bankruptcy was filed against Ashwood. It was not until June 30, 1967, eleven days after the commencement of the trial, that United filed an amended complaint raising, for the first time, Ashwood's alleged insolvency.

There was no evidence whatsoever introduced to support the allegation of Ashwood's insolvency, and the District Court properly concluded that:

> "As of the date fixed for completion of the Timzan contracts, that is, on or about May 15, 1965, Ashwood was solvent. Ashwood was not insolvent at any time relevant to the issues of the instant case." (Respondents' Brief, *Findings of Fact No. 70*, p. 38, *infra*)

III. Ashwood Did Not Increase the Bond Requirement From $161,000.00 to $221,000.00. There Was Never at Any Time Any Alteration of the Construction Contract Bonded by United.

Each of the construction contracts entered into by and between Ashwood and Timzan contained the following provisions:

> "The contractor shall furnish an acceptable surety bond in an amount at least equal to 100 per cent of the contract price as security. For the faithful performance of this contract and for payment of all persons performing labor and furnishing materials in connection with this contract." (Ashwood Exhibit LL)

The above provision was never modified in any respect whatsoever, and there was no evidence that was at any time offered by United that could lead to a contrary conclusion.

Ashwood estimated that the cost of performing the installation of water lines and storm and sanitary sewer mains would be the sum of $233,000.00. When Timzan offered a bond in the sum of $161,000.00, Ashwood rejected the same and the representatives of the two companies conferred and agreed that the work to be performed by Ashwood would amount to $221,000.00, and Ashwood

agreed to accept a bond in said sum. Thereupon, in the latter part of December, 1964, or early January, 1965, a request was made by Ashwood of United to increase the amount of the bond furnished for the water line and sanitary and storm sewer main contract. United agreed to furnish such bond, and, in fact executed and issued a rider to the bond guaranteeing performance of said contract, increasing the penal sum of said bond to $221,000.00.

On March 18, 1965, as the aforesaid rider had not been received by Ashwood, the Manager of United's Civil Bond Department mailed Ashwood a certified copy of the same signed by him and sealed by the corporation, increasing the penal sum of said bond by $60,000.00 to the sum of $221,000.00. The rider provided in part that:

> "WHEREAS a recomputation of the work to be done under said contract, at the unit prices stated therein, indicates an estimated contract price of $221,000.00; and
>
> "WHEREAS it was intended that the amount of the aforesaid bond should be one hundred per cent of said estimated contract price, and the parties to said bond desire to have the bond corrected in this respect;
>
> "NOW, THEREFORE, in consideration of an additional premium to be paid the surety, it is agreed that the penal sum of said bond shall hereby be increased by the sum of Sixty Thousand Dollars ($60,000.00), to a corrected sum of Two Hundred Twenty-One Thousand Dollars ($221,000.00);
>
> "BUT THAT SAID BOND SHALL IN ALL OTHER RESPECTS BE AND REMAIN AS ORIGINALLY WRITTEN." (Joint Defendants' Exhibit 7)

To further support its position, Ashwood introduced the testimony of the Manager of the Civil Bond Department of United, who, testifying on cross-examination, testified that:

"The contract in my estimation was never increased." (R. 714)

Upon the conclusion of the case, the District Court held:

> "Rarely has the Court seen a more perfect example of the doctrine of estoppel than applies to the situation of United's attempting to claim that the rider to Bond No. CG-1097 was unauthorized. The evidence clearly supports not only the fact that United did execute a rider to United Bond No. CG-1097 but also that United notified Ashwood of the execution of such rider with the express intention of inducing Ashwood to rely thereon. United errs in its contention that it was incumbent upon Ashwood to prove that the rider was executed; that the rider was signed by Timzan; and that the premium for the rider was paid by Timzan. United is estopped to deny that such did occur when by its own representations it led Ashwood to believe that such events had occurred. United's argument that it escapes liability on its bonds due to the alleged unauthorized increase of a bond amount is without merit." (Petition for Writ of Certiorari, *Conclusions of Law*, p. 31)

IV. The Bond in Question Is a Direct Action Bond, and the Materialmen, Central, Arrow Builders & Supply, Air Compressor Rental Company, J. J. Turner and Arturo Construction May Recover Upon It by Direct Suit.

The argument and cases cited by United in item IV of its petition for writ of certiorari, are the same urged by United in the District Court and in the United States Court of Appeals for the Sixth Circuit. The District Court's Findings of Fact (Respondents' Brief, p. 28, *infra*) and Conclusions of Law (Petition for Writ of Certiorari, pp. 27-28) clearly indicate that United did in fact,

agree, in issuing its bonds, to "pay all persons who have contracts directly with the Principal [Timzan] for labor and materials." (Joint Defendants' Exhibit 2)

United is a compensated surety. For a premium, United agreed to indemnify Ashwood for the performance of Timzan and assured Timzan's faithful performance for payment of all persons performing labor or furnishing materials in connection with the Brentwood project. United again asserts, as it has heretofore, that the distinguishing factor in permitting a laborer or materialman to recover upon direct suit against the paid surety, lies in the nature of the construction (public or private) for which the bond was issued. None of the cases cited by United support such a proposition. *Cleveland Metal Roofing & Ceiling Co. v. Gaspard,* 89 Ohio St. 185 (1914) relied upon by United was expressly overruled by *Royal Indemnity Co. v. Northern Ohio Granite Co.,* 100 Ohio St. 373 (1919) (syllabus 2).

It was determined as a matter of fact, that United intended to and did become obligated to pay the laborers and materialmen herein upon Timzan's failure to do so. The contracts, the faithful performance of which was assured by the bonding company, were incorporated in the bonds by reference. They contained the requirement that the contractor furnish "all of the labor, materials, necessary tools, expendable equipment * * * required to complete" the work. (Ashwood Exhibits II, JJ and KK) Ohio law is well settled that a surety who assures the faithful performance of a Principal is liable to materialmen and sub-contractors who furnished material and labor in default of the principal's payment therefor. It follows that laborers and materialmen do have a direct right of action against the bond. (*Royal Indemnity Co. v. Northern Ohio Granite and Stone Co., supra;* 11 Ohio Jur. 2d, *Con-*

tractors' Bonds, Section 4, p. 186) This was evidenced from the bond, the contract for which the bond was given, and the conduct of the parties in this proceeding. The cases cited by United do not support the proposition that despite United's agreement and intention, as manifested in the bond, it is the nature of the construction (public or private) that determines the rights of laborers or materialmen. There are no decisions of the Ohio Supreme Court which hold that a compensated surety is relieved from liability for the payment to sub-contractors and materialmen, contrary to its agreement, where the bond was issued for private construction.

11 Ohio Jur. 2d, *Contractors' Bonds,* Section 4, p. 186 provides that:

> "It is frequently stated by the courts that the *intention of the parties to a contractor's bond is the controlling factor in determining the right of laborers and materialmen to recover on the bond,* and the right of laborers and materialmen to recover on a building contract's bond depends upon the terms of the bond construed in the light of the contract in connection with which it is executed. Especially in the case of paid sureties, the courts have construed the contract of the paid surety, liberally in favor of liability, and have held that materialmen and subcontractors may sue on such a bond." (Emphasis added)

Each contract between Ashwood and Timzan provided that Timzan "shall furnish an acceptable surety bond for the faithful performance of 'such contract' and for payment of all persons performing labor and furnishing materials in connection" with such contract. The bonds of United incorporated the contracts and further provided that United "pay all persons who have contracts directly with the Principal [Timzan] for labor and materials."

These facts are embodied in the findings of fact of the District Court, which findings were reviewed by the United States Court of Appeals for the Sixth Circuit and found to be supported by substantial evidence.

In addition to liability of United under its bonds, United is liable to the materialmen and sub-contractors under the terms of an agreement dated April 1, 1965, between United, Ashwood, and Timzan and which agreement has been referred to herein, as the "Takeover Agreement." The findings of fact and conclusions of law of the District Court, as affirmed by the United States Court of Appeals for the Sixth Circuit, reflects that the evidence clearly established that pursuant to the Takeover Agreement, United did assume all of Timzan's obligations and did request that the Defendant materialmen and sub-contractors continued to deliver materials and/or to perform services on the Brentwood project. (Brief of Respondent, *Findings of Fact No. 44*, pp. 32-33, *infra*) (Petition for Writ of Certiorari, pp. 26 and 47-48) Accordingly, United, having failed to assert its non-liability under the Takeover Agreement, the issue of liability of United presented in item IV of its petition is moot.

V. United Employed Central to Install the Storm and Sanitary Sewers and Water Mains. Central Was Not a Volunteer. Central Performed the Necessary Conditions Entitling It to Payment.

A. Central Did Not Assume Timzan's Contract With Ashwood.

United sets forth a quotation from Central's cross-petition in an attempt to prove the assumption by Central of Timzan's contract with Ashwood. This is by no means the fact.

Here, again, as throughout these entire proceedings United has seen fit to take quotations out of context or to give them meanings clearly not intended.

United refers to a letter addressed by Central to United (Joint Defendants' Exhibit 40), but fails and neglects to take into consideration or to invite the Court's attention to the following language which appears on page 2 of the same exhibit:

> "To assist you herein and *without in any way assuming the existing contract between Timzan Inc. and Ashwood Construction Company* we will proceed to install the necessary sidewalks, paving, storm sewers, sanitary sewers and water lines * * *.
>
> * * * * *
>
> "* * * *and we in no way assume or agree to be bound by said original contract or any penalties therein contained.*" (Emphasis added)

The District Court's findings of fact and conclusions of law are contrary to United's contention herein. The Court's attention is specifically directed to Findings of Fact Nos. 28, 41, 45, 46, 48, 50 and 51 contained in the Appendix hereto at pages 29, 32, 33, 34, *infra*. The Record is replete with testimony supporting the foregoing findings by the District Court establishing that Central *did not* assume the Timzan contract but rather agreed to install the storm, sanitary sewers and water mains identified in Phase 1 of the original contract between Timzan and Ashwood (R. 1172-1179). United asserts that inspection by a Cuyahoga County sanitary engineer and the City of Cleveland were prerequisites to payment for work performed by Central. The Court considered this contention to be irrelevant and without merit. No evidence was introduced at trial showing such inspection to be a condition precedent

to the payment of sub-contractors. (Petition for Writ of Certiorari, *Conclusions of Law*, p. 27)

While the original oral agreement between United and Central provided for the payment by Central for the materials which Central installed, the agreement was later modified to provide that such materials were to be paid for directly by United. (R. 1239-1240)

For the first time in this case United, at page 21 of its petition, complains that Central's cross-petition failed to allege performance by Central of its obligations under its contract with United. Apart from the impropriety of raising such an issue for the first time on appeal before this Court, the fact of the matter is that Central's cross-petition did allege its performance, to-wit:

> "6) That pursuant to said last arrangement your answering defendant excavated and laid storm and sanitary sewers and performed certain other work in the total amount of $77,883.14 for which amount due demand was made of United Bonding Insurance Co. and which amount United Bonding Insurance Co. refused to pay." (Answer and Cross-Complaint of Pete Salemi d.b.a. Central Excavating Company)

The Trial Court found that there was clear and convincing evidence that Central performed the work and services for Timzan and United at Brentwood in the sum of $78,573.66 and did render statements for its services to United which were received by United with full knowledge of the workmanship, quality and progress of the work. United at no time protested or expressed any dissatisfaction with Central's work.

VI. The Timzan Contracts Were Not 95% Completed at the Time of Its Abandonment by United. United Had No Right to Partial Payment or Subrogation by Reason of Its Wilful and Intentional Breach of Its Contract and the Lack of Any Benefit Conferred Upon Ashwood by United's Alleged Performance.

United alleges at page 22 of its brief that the owner of Central Excavating Company, Pete Salemi, testified that when he stopped work the contract was 95% complete. That statement is utterly false.

The testimony of Pete Salemi to which United refers is as follows:

> Q. At the time you ceased to do any work, what is your best estimate of the percentage of completion that you had attained with respect to the installation of the storm and sanitary sewer?
>
> * * * * *
>
> A. Very close to 95%.
> Q. Did you put in any water lines?
> A. No.
>
> * * * * *
>
> Q. Did you do any paving?
> A. No." (R. 1198)

The various obligations of Timzan under its contracts with Ashwood are set forth in the contracts themselves. Those obligations included earthmoving, finished grading, slab preparation and clearing, construction and installation of all storm and sanitary sewers, water mains, sidewalks, roads and curbs. It is apparent that "very close to 95%" completion of installation of the storm and sanitary sewers is not the equivalent of 95% completion of all of the contracts. Further, the original estimated cost of the Timzan contracts was $311,000.00. (R. 1662-66) A registered

architectural structural and civil engineer and surveyor testified that the cost of completion of the improvements in Brentwood Subdivision at the time all work thereon had come to a halt was $146,047.00. (R. 2108-09 and 2112-13) Clearly, the contracts in question were not 95% complete.

Moreover, the work that was completed did not confer any benefit upon Ashwood.

Had United completed the Timzan contracts, in accordance with its obligation under the Take Over agreement of April 1, 1965, Ashwood would have been required to pay United the total estimated cost of the Timzan contracts, namely the sum of $311,000.00. (R. 1662-66)

Excluding all amounts awarded Ashwood against United by the District Court, the $311,000.00 which Ashwood would have been required to pay United upon completion of the Timzan contracts is dwarfed by the following expenses and damages incurred by Ashwood as the result of United's breach: $154,150.89 expended by Ashwood, itself, for installation of improvements which were the obligation of Timzan (Ashwood Exhibits OOO-OOOO, QQQQ-BBBBBB) (R. 1877-1912 and 1946-59); $146-047.00, which was the remaining cost of completion of the improvements to have been installed by Timzan in Brentwood Subdivision (R. 2100-14) (Ashwood Exhibit KKKKKK); $61,864.55 incurred by Ashwood for the salaries and expenses of Dover executive employees required to secure new contractors, financing, title work, indemnity bonds, and coordinate completion of the work to have been performed by Timzan and United (R. 1912-34, 1978-83 and 1997-99) (Ashwood Exhibits CCCCCC-EEEEEE); $188,600.00 in lost profits on the 82 homes contracted for in Brentwood Subdivision (Ashwood Exhibits KKK1-82) (R. 1839-49); and $395,600.00 in lost profits on the remaining 172 sublots in Brentwood Sub-

division on which homes would have been constructed and sold. (R. 1528)

In view of all of the amounts expended and all of the damages incurred by Ashwood by reason of United's flagrant breach of its contractual duties to Ashwood, United's assertion of any benefit, let alone a substantial benefit, conferred upon Ashwood is utterly incomprehensible.

Moreover, it is well settled that partial payment is not available to one who voluntarily, wilfully and unjustifiably breaches a contractual duty.

> "Where the undertaking is to do work and furnish materials under the terms of a special contract, and the work is abandoned after part performance, and left unfinished by the fault of the workman, in the absence of all evidence showing the assent of the employer, or his acceptance of the work part finished, there can be no recovery, pro tanto upon any established principle known to the law. The most familiar principles of the law inculcate the observance of good faith in the fulfillment of contracts; and it is the duty of courts to enforce the performance of contracts instead of encouraging their violation." *Allen v. Curles*, 6 Ohio St. 505, 509 (1856). (To the same effect see *Witherow v. Witherow*, 16 Ohio 238 (1847); *Larkin v. Buck*, 11 Ohio St. 562 (1860); and *Mehrin v. Stone*, 37 Ohio St. 49 (1881).)

It is equally settled that subrogation is not available to one who has breached a material contractual duty or is guilty of bad faith or inequitable conduct.

In *National Surety Corp. v. Allen-Codell Co.*, 70 F. Supp. 189 (E.D. Ky. 1947), the Court, holding that a surety was not entitled to subrogation where it was guilty of an inexcusable neglect in fulfilling its duties, held that:

"Subrogation is not an absolute right but, being purely a creature of equity is necessarily governed by the rules of equity. As in other cases in which equitable relief is sought, the court will weigh and balance the equities of the parties in the light of the facts and circumstances of the particular case and grant or withhold relief accordingly. Equitable relief may properly be withheld from one who is himself guilty of inexcusable neglect amounting to wrongful or inequitable conduct respecting the matter in litigation. One who through subrogation seeks relief against a third party must show a superior equity in himself. 'His equity must be strong and his case clear.'"

"It is a fundamental principle of Equity Jurisprudence that a court of equity will not lend its aid to enable one to take advantage of his own wrong. When a party seeking to set judicial machinery in motion in his own behalf, is shown to have breached a material contractual duty or to have been guilty of bad faith or inequitable conduct in the transaction in question, then the doors of the courts will be shut against them; the court will refuse to interfere on his behalf or award him any remedy."

The evidence in this case clearly established that in December, 1964, United wrote three surety bonds to guarantee the performance of Timzan under its contracts with Ashwood. Timzan defaulted, and on April 1, 1965, United agreed to take over and perform the obligations of Timzan. In furtherance of its agreement, it hired sub-contractors and materialmen and agreed to pay them for their labor and materials. On May 7, 1965, it abruptly abandoned its obligations, refused to pay the sub-contractors and materialmen which it had hired, and then advised many of the sub-contractors and materialmen to file mechanic's liens against Brentwood Subdivision,

thereby bringing the development to a grinding halt, and leaving it in a hopeless condition.

The District Court was fully justified in finding that United "wilfully and intentionally breached its obligations" under its bonds and the Takeover Agreement of April 1, 1965, and in refusing United partial payment and subrogation. (Order and Judgment of the District Court entered January 10, 1968; Petition for Writ of Certiorari, *Conclusions of Law*, pp. 47-50)

CONCLUSION.

While United would prefer it to be otherwise, the questions which it presents for consideration by this Court are solely questions of fact which have been heretofore decided and affirmed.

The trial of the within case covered a period of seven weeks. It was tried without a jury to the Honorable Gerard E. Kalbfleisch, Chief Judge of the United States District Court for the Northern District of Ohio. The testimony consumes 2216 pages contained in five volumes and is accompanied by several hundred exhibits, all of which were carefully considered by the District Court, as evidenced by the extensive Findings of Fact set forth in the Appendix hereto and in the Conclusions of Law set forth in the Appendix to United's Petition for Writ of Certiorari.

All of the matters presented were carefully reviewed by the United States Court of Appeals for the Sixth Circuit, which found that the Findings of Fact were supported by substantial evidence and that the Conclusions of Law were correct.

From the foregoing, it is apparent that United has failed to present any appropriate ground or reason for the

granting of its Petition for a Writ of Certiorari. These respondents urge that the Petition be denied.

Respectfully submitted,

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APPENDIX.

FINDINGS OF FACT OF TRIAL COURT.

(Filed December 20, 1967.)

KALBFLEISCH, *Ch. J.*

This cause came on for trial and the Court, having heard the evidence and considered the stipulations of the parties, finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT.

1. The Court has jurisdiction of the parties and of the subject matter herein by virtue of Section 1332 and Section 2201 of Title 28, United States Code. There is complete diversity among the parties.

2. The plaintiff, United Bonding Insurance Company, hereinafter called United, is a corporation organized under the laws of the State of Indiana, and is authorized to do business in the State of Ohio as a surety.

3. The defendant Dover Construction Company, hereinafter called Dover, is an Ohio corporation, which through approximately thirteen subsidiary corporations is engaged in the development of real estate and the construction thereon of single-family residences.

4. The defendant Ashwood Construction Company, hereinafter called Ashwood, is an Ohio corporation and a wholly-owned subsidiary of Dover.

5. In the fall of 1963 Ashwood acquired title to certain land situated in Olmsted Township, Ohio, hereinafter called Brentwood, such land being the subject premises of the instant suit.

6. The land in question, Brentwood, was purchased by Ashwood from Bolingbrook Construction Company,

also a wholly owned subsidiary of Dover, the transfer of ownership being accomplished by the assumption of Ashwood of a $125,000.00 mortgage running from Bolingbrook to the National City Bank of Cleveland, Ohio.

7. On October 15, 1964 Ashwood procured a commitment from Prudential Insurance Company, hereinafter called Prudential, for a loan to finance the construction and installation of a sewage treatment plant, water lines, storm and sanitary sewers, sidewalks, asphaltic streets and curbs in Brentwood, which loan was to be secured by a first mortgage upon Brentwood.

8. Said loan commitment from Prudential provided in part for the disbursement to Ashwood of the sum of $500,000.00 on or before October 12, 1965, conditioned upon the completion of the construction and installation at Brentwood of (a) a sewage treatment plant to service a total of 254 sublots in Brentwood, and (b) water lines, storm and sanitary sewers, sidewalks, asphaltic streets, and curbs for 91 of the 254 sublots in Brentwood, said sublots to be developed first.

9. The loan commitment from Prudential provided that in the event disbursement was not made of the sum of $500,000.00 on or before October 12, 1965, the loan commitment would expire and Ashwood would be required to pay Prudential service fees in the sum of $19,312.50.

10. On November 2, 1964, Ashwood entered into an agreement with Commercial Discount Corporation wherein Ashwood assigned to Commercial Discount all purchase money notes and second mortgages acquired by Ashwood in the course of its business from purchasers of land and buildings owned by Ashwood.

11. On May 25, 1965 Commercial Discount notified Prudential of such assignment by Ashwood to Commercial Discount. Prudential did not consider such assignment to destroy or have any effect on the loan commitment from Prudential to Ashwood.

12. Ashwood erected three model homes at Brentwood for prospective purchasers to inspect.

13. On November 12, 1964 Ashwood entered into an agreement with R. A. Klingler, Inc., for the construction and installation of a sewage treatment plant to service the 254 sublots at Brentwood.

14. On December 11, 1964 Ashwood entered into three written agreements with Timzan, Inc., hereinafter called Timzan, for the construction and installation of water lines, sanitary and storm sewers, sidewalks, roads and curbs at Brentwood.

15. Contract one (Ashwood's Ex. II) related to all "earthwork, clearing, finish grading and driveways cut" to be done at Brentwood by Timzan. The base bid price of the contract was $41,146.00.

16. Contract two (Ashwood's Ex. JJ) related to the installation of sewer mains, water mains and storm sewers at Brentwood by Timzan. The base bid price of the contract was $483,985.34.

17. Contract three (Ashwood's Ex. KK) related to all road and curb construction to be done at Brentwood by Timzan. The base bid price of the contract was $184,667.00.

18. The three contracts referred to above contained the express provision that the "Contractor will supply performance bond in the amount of 100% of contract."

19. The three contracts (Ashwood's Ex. II, JJ, and

KK) were to be performed in accord with work order releases, the first of which had to do with the improvement of 91 sublots. (See addenda No. 2 of Ashwood's Ex. II or Ashwood's Ex. O.) The first work order released under contract one (Ashwood's Ex. II), hereinafter referred to as stage one of contract one, was for the sum of $14,000.00; the first work order released under contract two (Ashwood's Ex. JJ), hereinafter referred to as stage one of contract two, was for the sum of $161,000.00; the first work order released under contract three (Ashwood's Ex. KK), hereinafter referred to as stage one of contract three, was for the sum of $76,000.00. Ashwood agreed to accept bond coverage only to the extent of each work order released. (See Ashwood's letter of December 11, 1964 attached to Ashwood's Ex. KK.)

20. Payment by Ashwood on the three contracts was not to be made until all of the work in the work order was completed by Timzan.

21. These three contracts between Ashwood and Timzan were unit price contracts, by the terms of which Timzan was to be paid an amount equal to the total number of units of labor and materials furnished by Timzan, measured at the conclusion of the contract, times the price per unit relating to such labor and materials as set forth in the contracts.

22. In accordance with the contract requirement that Timzan supply a performance bond, three bonds relating to the first work order releases of the contracts were purchased by Timzan from United. These bonds were: United Bond No. CG-1099 in the penal sum of $14,000.00 covering stage one of contract one; United Bond No. CG-1097 in the penal sum of $161,000.00 covering stage one of contract two; and United Bond No. CG-1098 in the

penal sum of $76,000.00 covering stage one of contract three.

23. United Bonds Nos. CG-1097, CG-1098, and CG-1099 contain, inter alia, the following language:

> "* * * the condition of this obligation is such that, if the Principal [Timzan] shall faithfully perform the contract on his part, and shall fully indemnify and save harmless the Obligee [Ashwood] from all cost and damage which the Obligee may suffer by reason of failure so to do and shall fully reimburse and repay the Obligee all outlay and expense which the Obligee may incur in making good any such default, and shall pay all persons who have contracts directly with the Principal for labor or materials, then this obligation shall be null and void, otherwise it shall remain in full force and effect." (See Joint Defendants' Ex. 2.)

24. Ashwood, upon receipt of Bond No. CG-1097, advised Timzan that Timzan's cost estimate covering stage one of contract two was inaccurate; whereupon it was agreed by and between Ashwood and Timzan that the estimated product of the total units of labor and materials to be furnished by Timzan in completing stage one of contract two, times the price designated in the contract for such units would be $221,000.00.

25. In late December of 1964 United was informed of the revised estimate of $221,000.00 agreed to between Timzan and Ashwood for the completion of stage one of contract two relating to the installation of water lines, storm and sanitary sewers on the 91 sublots.

26. United agreed to furnish a rider to its Bond No. CG-1097 in order to increase the coverage thereof from $161,000.00 to $221,000.00. In accordance therewith, on or about March 18, 1965, United, through its duly author-

ized representative, Mr. Edward Donaldson, delivered to Ashwood, with the intention of being bound thereon, a certified copy of a rider to the bond, signed and sealed by Donaldson, to increase the penal sum of Bond No. CG-1097 by the amount of $60,000.00. (Joint Defts.' Ex. 7A and 7B.)

27. Timzan began work on stage one of the three contracts entered into with Ashwood and, pursuant thereto, Timzan contracted for the services of several subcontractors to perform certain work at Brentwood. Among others, such subcontractors included defendant Central Excavating Company, hereinafter called Central; defendant Arrow Builders Supply Company, hereinafter called Arrow; defendant Air Compressor Rental Company, dba A.C.R. Equipment Company, hereinafter called Air Compressor; defendant J. J. Turner, Inc., hereinafter called Turner; defendant Price Bros. Company, hereinafter called Price Bros.; defendant Arturo Construction Company, hereinafter called Arturo; and defendant Empire Excavating Company, hereinafter called Empire.

28. Upon the urging of United who promised to "make good" all rental charges due from Timzan if the same were not paid by Timzan, Central placed two units of heavy excavating equipment together with operating personnel therefor at the Brentwood job site from February 5, 1965 through February 26, 1965, for which Timzan was billed by Central in the amount of $10,918.33.

29. In December of 1964 an agreement was reached between Timzan and Arrow wherein Arrow agreed to supply vitrified sewer pipe and other necessary materials to the Brentwood job site for completion of stage one of the contracts between Ashwood and Timzan. Arrow and Timzan agreed to a definite price and to the specific quan-

tities of pipe and other materials needed, and further agreed that the materials would be delivered as ordered by Timzan. When they accepted the order from Timzan, both Arrow and Central were informed of and relied upon United's performance bond.

30. From February 2, 1965 to March 23, 1965, Arrow sold and delivered materials to the Brentwood job site and Timzan was invoiced at the agreed prices. Timzan's account balance as of March 23, 1965, as related to the Brentwood project was $14,474.76. This amount represented the reasonable value of the materials sold and delivered to Brentwood by Arrow.

31. On January 26, 1965, Air Compressor entered into an agreement with Timzan relating to a piece of equipment known as a Lorain 50 Backhoe. Said piece of equipment was delivered to Brentwood on January 26, 1965 for use by Timzan, and remained in the possession and control of Timzan for a period of five months from the date of delivery. The reasonable rental for such piece of equipment for this period is $6,000.00.

32. On March 2, 1965, Air Compressor entered into a second contract with Timzan relating to a piece of equipment know nas a D-8 Caterpillar Bulldozer. Said bulldozer was delivered to Brentwood in March of 1965 for use by Timzan and remained in the possession and control of Timzan for a period of four months from the date of delivery. The reasonable rental for such piece of equipment for this period is $6,000.00.

33. Air Compressor was informed of and relied upon United's performance bond in accepting the order from Timzan.

34. Central, Arrow and Air Compressor have not received payment from any party for the sums due and

owing to them arising out of their respective contracts with Timzan.

35. In March of 1965 an agreement was reached between Timzan and Turner wherein Turner agreed to supply trenchers and a pump assembly to the Brentwood job site for the completion of stage one of the contract between Timzan and Ashwood. This equipment was used by Timzan at Brentwood from March 17, 1965 until April 17, 1965, the reasonable rental value of the equipment for such period being $935.63. Turner has not received payment from any party covering the stated rental fee.

36. Arturo provided construction equipment and performed work at Brentwood pursuant to a contract with Timzan, the reasonable value of such services being $15,577.20. In April of 1965 Arturo received partial payment in the amount of $10,000.00 from United, but the balance of $5,577.20 has never been paid to Arturo by any party.

37. From February through April of 1965, Price Bros., pursuant to contracts with Timzan and United, furnished concrete pipe for the Brentwood project, the reasonable value of which was $56,190.40. On July 9, 1965, Price Bros., caused a mechanic's lien for such amount to be prepared, filed and recorded. In September of 1965, Ashwood paid Price Bros. the sum of $47,761.92 in full settlement of Price Bros.' claim and release of lien. No payment was ever received by Price Bros. from Timzan or United.

38. Empire, who has failed to make an appearance in this suit, did perform work at Brentwood for which it was not paid, and on April 17, 1965, filed a mechanic's lien against Brentwood for the sum of $7,598.00.

39. As Timzan, pursuant to its contracts with Ashwood, proceeded with work on the Brentwood project it

became apparent to all parties involved that Timzan was having difficulty in completing such contracts, work progress by Timzan fell behind schedule and during the early months of 1965 several of Timzan's subcontractors threatened to stop work at Brentwood due to non-payment by Timzan.

40. Representatives of United became aware of the difficulties Timzan was encountering at Brentwood. They also became acutely aware of the fact that the stage one contracts between Ashwood and Timzan contained a liquidated damage clause by the terms of which Timzan was to pay Ashwood the sum of $300.00 for each day completion of the stage one contracts was delayed beyond April 16, 1965.

41. Recognizing its obligation under its bonds, United persuaded the various subcontractors to return to work at Brentwood and agreed that United would pay all charges of the subcontractors if Timzan failed to do so.

42. In March of 1965 Timzan's problems increased at the Brentwood project and it became apparent to all parties concerned that Timzan was unable to fulfill the commitments on its contracts with Ashwood.

43. The representatives of the various parties involved in the Brentwood project had many meetings in February and March of 1965 in an attempt to resolve the difficulties caused by Timzan's failure.

44. On April 1, 1965 these meetings culminated in a written agreement, signed by the authorized representatives of both Ashwood and United, in which United agreed to assume all of the obligations of Timzan under the latter's contract with Ashwood, and Ashwood agreed that the date for completion of stage one of contract two (Ashwood's Ex. JJ) for installation of water lines and sanitary

and storm sewers would be extended from April 16, 1965 to May 1, 1965.

45. Pursuant to the agreement of April 1, 1965, hereinafter called the takeover agreement by and between Ashwood, Timzan, and United, United hired Central to replace Timzan as main contractor and Central continued work on the Brentwood job site as a direct subcontractor for United. United also agreed to pay Central in accord with invoices furnished covering work performed prior to the takeover agreement of April 1, 1965 (Central's Ex. D).

46. In reliance on United's promise and the formal takeover agreement, Central resumed work at Brentwood on April 8, 1965.

47. On April 8, 1965 Central received a $15,000.00 payment from United. On April 23, 1965 Central received a $12,000.00 payment from United. Transmittal letters accompanying both payments indicated that they were for "Work done for Timzan, Inc."

48. Central continued work at Brentwood until May 27, 1965, sending invoices for all work performed from February 5, 1965 until May 27, 1965, to United. On May 27, 1965 Central terminated its work at Brentwood due to nonpayment of its invoices by United.

49. United not only knew such work was being done but agreed to pay Central for all work done at Brentwood.

50. From February 25, 1965 to June 3, 1965, Central rendered statements for its services to United in the total amount of $105,573.66. United paid Central the sum of $27,000.00 on account, as stated hereinbefore in paragraph 47. United received all of Central's statements with full knowledge of the workmanship, quality of the work, and progress of the work, and made no protest and expressed no dissatisfaction with any of Central's work at any time.

51. The balance due on account for services performed and work done by Central at Brentwood for Timzan and United is $78,573.66.

52. On March 23, 1965 Arrow was instructed by United that, due to the default of Timzan, Arrow should invoice and would be paid by United for all future materials delivered by Arrow to Brentwood. Arrow had not been paid for materials delivered to Timzan at Brentwood and had discontinued sale and shipment of additional orders. But upon United's assurance that it would guarantee payment of Arrow's account with Timzan, under its Bond No. CG-1097, Arrow continued to sell and deliver materials to Brentwood through May of 1965 and, as instructed by United, invoiced United for the sum of $23,077.79 for such materials. Arrow was aware of and relied on the April 1, 1965 takeover agreement between Ashwood and Timzan and United.

53. There remains due and unpaid to Arrow the total sum of $37,552.55 (see findings Nos. 30 and 52) for materials sold to United and Timzan for the Brentwood project.

54. On May 7, 1965 United advised Ashwood by telegram (Joint Dfts.' Ex. 8) that United's Bonds Nos. CG-1097, CG-1098 and CG-1099 were "null and void from their inception," and that Ashwood should be "governed accordingly." United simultaneously informed its authorized representative handling the Brentwood project that "as of this date [May 6, 1965] take no further action of any kind on Timzan matters * * *."

55. United informed Arrow in writing on June 10, 1965, that United was denying any obligation relating to the Brentwood project. Prior thereto both Arrow and Central had stopped work at Brentwood due to nonpayment by United.

56. Upon United's notification that it would not honor its performance bonds and that it would not comply with its agreement to take over the performance of Timzan's obligations on its contracts with Ashwood pursuant to the takeover agreement of April 1, 1965, Ashwood attempted to hire Central to complete the work undertaken by United at Brentwood.

57. Due to the fact that Central had received no payment from Timzan or United for work completed, Central refused to continue work at Brentwood as the direct contractor of Ashwood unless it received periodic progress payments. Such periodic progress payments were not required to be made by Ashwood to Timzan under the contracts between Ashwood and Timzan.

58. Subsequent to United's withdrawal and Central's refusal to continue work at Brentwood, Ashwood made a further search for a general contractor to complete all the work at Brentwood under substantially the same terms as those of the Timzan contracts. No general contractor approached by Ashwood was willing to undertake completion of a job which had been started by another contractor, since problems might arise as to the work previously performed and materials installed, particularly since the original contractor and its suppliers of materials had not been paid for work previously performed and materials furnished. In addition, every general contractor Ashwood sought to obtain demanded periodic progress payments.

59. In an attempt to obtain new financing for the improvement of Brentwood which would include periodic disbursement of funds as the work progressed, Ashwood, in June of 1965, entered into negotiations for a loan with Women's Federal Savings & Loan of Cleveland, Ohio, hereinafter called Women's Federal. In order to obtain a

loan from Women's Federal, Ashwood was forced to pay Women's Federal the amount of $15,750.00 in loan and appraisal fees, and Lawyers Title Insurance Corp. the amount of $2,400.00 in title and escrow fees.

60. Ashwood was successful in its negotiations with Women's Federal for a loan in the sum of $515,000.00, which provided for periodic payments to be made as the work progressed at Brentwood. Ashwood then contracted with B. & L. Excavating, Inc. on June 29, 1965 (Ashwood's Exs. DD and EE) for the completion of installation of water lines, sanitary and storm sewers at Brentwood, and with Griffith Blacktop, Inc. on June 29, 1965 (Ashwood's Ex. FF) for all road and curb construction at Brentwood. These three contracts related to performance of work originally undertaken by Timzan and United.

61. Several of the subcontractors of Timzan and United filed mechanic's liens against the Brentwood premises. The subcontractors who filed and the respective dates of the liens were:

Empire Excav.	—lien filed April 17, 1965
J. J. Turner	—lien filed July 2, 1965
Price Bros.	—lien filed July 9, 1965
Central	—lien filed July 16, 1965
Arrow	—lien filed July 19, 1965
Arturo	—lien filed July 22, 1965
Air Compr.	—lien filed Aug. 11, 1965.

The total of all these liens was the sum of $190,358.93.

62. Several of the subcontractors had been advised by United to file such liens against Brentwood.

63. As a result of the filing of the mechanic's liens, Ashwood was required to obtain a bond from Progressive Mutual Insurance Company to indemnify Women's Federal and also Lawyers Title for any loss by reason of such mechanic's liens. The premium for this bond was $7,200.00.

64. The completion of the Brentwood improvements was delayed beyond October 12, 1965 due to the numerous delays occasioned by the default in performance by United and Timzan. As a result, the loan commitment Ashwood had from Prudential expired. On October 12, 1965, Ashwood requested that Prudential extend the loan commitment relating to Brentwood for ninety days; however, Prudential refused to extend the loan commitment date and Ashwood became obligated to pay Prudential a fee of $19,312.50 by reason of its failure to take such loan.

65. Ashwood entered into purchase order agreements with 82 prospective home owners for homes constructed at Brentwood by Ashwood. All of the prospective purchasers paid sizable downpayments for such homes, ranging from $1,900.00 to $15,000.00.

66. By reason of the delay in the completion of improvements at Brentwood, it became impossible for Ashwood to construct and deliver the homes to the purchasers on the delivery dates promised and this resulted in many of the purchasers canceling their purchase order agreements with Ashwood. By January of 1966 only about 20 of the 82 purchase agreements remained uncanceled.

67. Unfavorable newspaper publicity (Ashwood's Ex. GG) ensued as a result of Ashwood's failure to deliver the homes to the purchasers on the date promised. Ashwood determined that its successful completion of Brentwood was not possible, and concluded that Brentwood should be sold to another builder.

68. Frank W. Kabbes, a registered engineer and surveyor, in May of 1966 estimated the cost of completion at Brentwood of stage one of contracts one, two and three (Ashwood's Exs. II, JJ, and KK) to be $146,047.00.

69. The work Timzan and United performed failed to

meet the specifications in the Timzan contracts, and the expense of correcting the unacceptable work is a very substantial part of the estimated cost by Frank W. Kabbes. (See Finding No. 68.)

70. As of the date fixed for completion of the Timzan contracts, that is, on or about May 15, 1965, Ashwood was solvent. Ashwood was not insolvent at any time relevant to the issues of the instant case.

71. A certified financial statement of Dover and its subsidiaries (Ashwood's Ex. JJJ) shows their combined net worth as of January 31, 1965 to be $3,173,400.00.

72. On or about August 17, 1966, Dover along with all its subsidiaries, including Ashwood, was precipitated into bankruptcy in the District Court for the Northern District of Illinois, Chicago, Illinois. Currently, Dover Construction Company and its subsidiaries are being reorganized, with the debtor remaining in possession, under Chapter XI of the Bankruptcy Act.

73. At the time United repudiated its takeover agreement and bonds in May of 1965, the Prudential loan commitment was more than adequate to meet Ashwood's obligations to Timzan or United pursuant to their contracts with Ashwood. United did not raise the issue of Ashwood's alleged insolvency until subsequent to the filing by Dover, in August of 1966, of its petition for reorganization under Chapter XI of the Bankruptcy Act. (See Finding No. 72.)

74. United failed to prove that anticipated insolvency of Ashwood was the reason for United's breach of its obligations under its bonds and takeover agreement.